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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cases on October 9, 1956.

CITATIONS TO OPINIONS BELOW

The appendix is presented in a separate printed volume. The decision and order of the Presiding Examiner, issued May 6, 1955, are unreported; they are printed in Appendix E, pp. 64, 185. The opinion and order of the Federal Power Commission, issued

August 4, 1955, are reported in 9 PUR (3d) 405 and printed in Appendix C, pp. 19, 44. The opinion of the Court of Appeals, issued October 9, 1956, is reported in 237 F. 2d 777; it is printed in Appendix B, p. 5.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 9, 1956 (Appendix B, p. 18). Rehearing was denied on November 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether, in licensing three dams which would preclude construction of a single high dam proposed as a key multi-purpose storage project in the Army Engineers' comprehensive plan for developing the Columbia River system, and which would provide lesser flood control, power production and other public benefits than the high dam project, the Federal Power Commission violated the requirement of § 10(a) of the Federal Power Act (16 U.S.C. § 803(a)) that: ". . . the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement or utilization of water-power development and for other beneficial public uses including recreational purposes . . ."

2. Whether, although the Federal high dam project would produce more power at lower cost per kilowatt than the three dams, the Commission could properly assume that the three dams, proposed only for private

construction and financing, would be constructed and financed by the United States, as the basis for concluding that their power output would be lower cost than the high dam output and hence justifying the license decision; and whether, even if the three private dams could produce lower cost—but less—power than the Federal high dam project, the license decision was proper as a matter of law under the Federal Power Act.

3. Whether, in approving license applications for the three dams and refusing to submit findings to Congress with recommendations for Federal development of the water resources involved by means of the high dam project, where the latter would provide broader indirect economic benefits for the Pacific Northwest region as well as greater direct benefits, and where bills to authorize its construction were pending, the Commission violated the requirement of § 7(b) of the Federal Power Act (16 U.S.C. § 800(b)) that: "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but . . . shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

4. Whether the Supreme Court decision in *Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953) is authority for the Commission decision under § 7(b) in this case.

5. Whether, in treating the three dams as units of a single project and requiring that only one need be commenced within two years, permitting the others to be commenced four years and six years, respectively,

after the license, and acknowledging that the third dam might never be commenced and that the license as to said dam might later be terminated, the Commission violated the requirement of § 13 of the Federal Power Act (16 U.S.C. § 806) that construction of licensed project works shall be commenced not more than two years from the date of the license.

6. Whether, in view of the terms, conditions and reasons contained in the Commission opinion and order, licensing the three dams and refusing to submit findings to Congress with recommendations for Federal development, the Commission otherwise violated § 10(a), § 7(b) or § 13 of the Federal Power Act.

7. Whether the Commission failed to determine material issues of fact and failed to rule on petitioners' proposed findings and exceptions; and if so, whether such failures, especially when coupled with the Commission's silence concerning the Examiner's findings, violated § 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) and § 1.30(g) of the Commission's Rules (18 CFR § 1.30(g)).

8. Whether the Commission relied on "adjustments" of evidence presented in a brief as "analyses," never subject to cross-examination or rebuttal; and if so, whether the Commission violated § 7(d) of the Administrative Procedure Act (5 U.S.C. § 1006(d)) and § 1.20(k) of the Commission's Rules (18 CFR § 1.20 (k)).

9. Whether the Commission's post-license *ex parte* order of November 3, 1955, approving revised project designs for the three licensed dams, violated petitioners' rights as intervenors and vitiated the adversary proceeding and the Commission license decision of August 4, 1955 predicated thereon.

STATUTES INVOLVED

This case involves the following provisions of the Federal Power Act:

Section 10(a), 41 Stat. 1068, as amended, 49 Stat. 842, 16 U.S.C. § 803(a);

Section 7(b), 41 Stat. 1067, as amended, 49 Stat. 842, 16 U.S.C. § 800(b); and

Section 13, 41 Stat. 1071, 16 U.S.C. § 806;

Also the following provisions of the Administrative Procedure Act:

Section 7(c), 60 Stat. 241, 5 U.S.C. § 1006(c);

Section 7(d), 60 Stat. 241, 5 U.S.C. § 1006(d); and

Section 8(b), 60 Stat. 242, 5 U.S.C. § 1007(b);

These statutory provisions are printed in Appendix A, pp. 1-4, as are also the relevant provisions of the Federal Power Commission's Rules of Practice and Procedure.

STATEMENT OF THE CASE

On December 15, 1950, Idaho Power Company applied to the Federal Power Commission for a license to construct a low-head power dam at Oxbow, in the Hells Canyon stretch of the Snake River, between Idaho and Oregon. Before action was taken on this application, the Company, on May 15, 1953, applied for license to construct two additional projects in the same stretch: a reservoir project at Brownlee, 11 miles upstream from Oxbow, and another low-head project 25 miles downstream from Oxbow.

On July 7, 1952, the Secretary of the Interior intervened to oppose the first application. He advocated a Commission recommendation under § 7(b) of the Federal Power Act that the United States itself develop the Hells Canyon stretch by means of a single high dam, as he had already recommended to Congress.

The three Idaho Power dams would occupy the reservoir area of the proposed high dam and preclude its construction.

In February, 1950, the Army Corps of Engineers and Bureau of Reclamation had submitted to Congress their coordinated comprehensive plan for developing the Columbia River and its major tributaries, of which the Snake is the largest. The core of the plan, called the Main Control Plan, included a system of 14 interrelated multi-purpose projects, some of which had already been built by the Federal Government or authorized for Federal construction.[1] One of the key upstream storage projects in that plan is the proposed high multi-purpose dam at Hells Canyon. The Army and Interior Departments recommended that it be authorized for construction by the Bureau of Reclamation.[2]

The three Idaho Power dams would have about one-fourth the usable storage capacity of the proposed high dam for flood control, power production and other purposes. Quantitatively, the direct public benefits from the three dams cannot match those to be derived from the high dam (App. E, pp. 83, 117, 128, 152, 168-169, 170; Fdgs. 15, 61-78, 88-89, 94-99, 110-113,

[1] The comprehensive plan was prepared under special Congressional authorization, at a public expense of many millions of dollars. Most of the 14 multi-purpose projects in the Main Control Plan have been specifically authorized by Congress. Nine are built or under construction. More than $1.8 billion of Federal funds have been invested in the completed projects. Completion of those under construction will increase the investment to about $2.5 billion.

[2] A bill for that purpose was introduced but tabled. Similar measures have been introduced in succeeding Congresses, but up to the present time the high dam has not been authorized.

117, 121-122, 125-126, 138-139; also App. C, pp. 46-50; Fdgs. 5, 7, 10, 11, 12, 14, 18). The Federal project, with its larger and lower-cost power output, would also produce far greater indirect benefits than the private project (App. E, pp. 98-107, 119, 172-195; Fdgs. 25-27, 148, 157-164, 167; also App. C, pp. 50-51; Fdgs. 20, 23).

The Secretary's intervention before the Commission in support of the high dam was withdrawn by his successor on May 5, 1953. Thereupon various interested groups in the Pacific Northwest organized National Hells Canyon Association, Inc.;[3] and on July 9, 1953, the Association and eight Public Utility Districts (PUDs) of the state of Washington were granted leave to intervene in the Commission proceedings. They likewise opposed the Idaho Power applications and advocated that the Commission recommend to Congress the proposed Federal development. National Rural Electric Cooperative Association (NRECA) had intervened earlier, on February 16, 1953, for the same purposes.[4]

Hearings on the Company's three applications commenced before a Presiding Examiner July 7, 1953,

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[3] The Association is a non-profit corporation, composed of most of the farm and labor groups, and other citizens' organizations, as well as non-profit utility associations, in the Pacific Northwest.

[4] The Association, the 8 PUDs and NRECA, petitioners herein, represent practically all the non-profit municipal, county and rural electric utility systems in the Pacific Northwest. These systems have utility investments of more than $1 billion in facilities existing or under construction, and they serve over 1,700,000 persons. Under the Bonneville Project Act (16 U.S.C. § 832), they are entitled to preference in the sale of power from the Federal Columbia River power system. The Federal system is their principal, and in many instances their only, source of power.

and, with occasional recesses, continued through July 9, 1954.

The Examiner issued his decision May 6, 1955. He recommended that the Brownlee application be granted, and the other two denied; he rejected the contention that Federal development of the high dam should be recommended to Congress under § 7(b) (App. E, pp. 112, 155).

Exceptions were filed, and on July 6, 1955, oral argument was held before the Commission. On August 4, 1955, the Commission issued its decision. It declined to recommend Federal development under § 7(b) and licensed all three Idaho Power projects (App. C, pp. 38, 43). A petition by intervenors for rehearing was denied September 29, 1955.

On November 28, 1955, the intervenors, petitioners herein, appealed to the Court of Appeals for the District of Columbia Circuit, under § 313(b) of the Federal Power Act (16 U.S.C. § 825 1(b)). Meanwhile, pursuant to the license order, Idaho Power Company filed revised project designs for two of its three dams (Brownlee and Oxbow); and, by an *ex parte* order issued November 3, 1955, the Commission approved these revisions (App. D, p. 62). On January 4, 1956, the Commission denied intervenors' petition to vacate the order. Petitioners thereupon, on February 6, 1956, appealed the November 3 order to the Court of Appeals under § 313(b) of the Federal Power Act. The two appeals were consolidated.

The Court of Appeals issued its opinion and entered its judgment on October 9, 1956. It affirmed the Commission decision and orders (App. B, pp. 5, 18). A petition for rehearing *en banc* was denied on November 16, 1956.

The Commission, in denying rehearing September 29, 1955 on its license decision, had refused to stay the effectiveness of its license order. On June 14, 1956, the Commission approved, over the objection of petitioners herein, the issuance of securities by Idaho Power Company to finance construction work at the Brownlee site. Petitioners promptly applied to the Court of Appeals to stay the effectiveness of the license until the Court's determination of the appeals then pending. On July 2, 1956, the application was denied.

Thereupon petitioners applied to the Supreme Court for a stay. On August 15, 1956, in the absence of Chief Justice Warren, Circuit Justice for the District of Columbia Circuit, senior Associate Justice Black considered the application. He denied it. But he did so in consideration of: (a) a written agreement by Idaho Power Company, waiving and releasing any claim against the United States on account of construction costs or other expenses incurred under the license, and indemnifying the United States against any expenses of litigation and judgments arising therefrom, if the license should ultimately be held invalid; and (b) a bond posted by Idaho Power Company to restore the lands and navigable waters of the United States to conditions satisfactory to the appropriate Government agency, if the license should ultimately be held invalid.

Bills to authorize construction of the Federal high dam have been reintroduced in both Houses of the 85th Congress, and hearings thereon have been scheduled.

REASONS FOR GRANTING THE WRIT

1. The case presents important Federal statutory questions of first impression.

a. Interpretation of § 10(a).

Foremost is the question whether the decisions below properly interpreted the § 10(a) licensing provision of the Federal Power Act (16 U.S.C. § 803(a)). Never before has the meaning of this licensing standard—applicable to all non-Federal hydroelectric projects on rivers in the public domain—been judicially tested.

Section 10(a) requires, as a condition to the licensing of any such project, that

> ". . . the project adopted, . . . shall be such as in the judgment of the Commission will be *best adapted to a comprehensive plan for improving or developing a waterway or waterways* for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; . . ." [Emphasis supplied]

Originally Congress itself determined how all national waterways were to be developed, by whom, and on what terms and conditions. In the Federal Power Act of 1920, however, Congress delegated to the Federal Power Commission responsibility for licensing non-Federal developments in accordance with the multi-purpose conservation objectives of the Act as a whole and § 10(a) in particular. The italicized language quoted above from the amended Act of 1935 is substantially the same as in the original 1920 statute.[5]

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[5] The phrase "or waterways" was added to § 10(a) to broaden "the factors to be considered by the Commission". H. Rept. 1318, 74th Cong., 1st Sess., p. 24.

In using the term "a comprehensive plan", to what did Congress refer? What did Congress intend by the term "best adapted"? No previous case furnishes the answers. Such answers as were offered by the Commission and Court below are unclear, contradictory and inconsistent with the history and purpose of the Act and its administration.

The Examiner held the Brownlee dam alone—not the 3-dam combination proposed by Idaho Power—"best adapted to a comprehensive plan" (App. E, p. 122, Fdg. 44). He held that, because it would be "fancy-priced" the power from the three dams would not all be marketable, and therefore two of the dams would be economically infeasible. Since the Brownlee dam could provide some non-power as well as power benefits—although far less than those from the high Hells Canyon project—he held that the Brownlee dam would satisfy the § 10(a) standard (App. E, pp. 102-107, 118-119, 120, 122, Fdgs. 20-27, 31, 33, 34, 44).

The Commission held the 3-dam combination in its entirety "best adapted to a comprehensive plan" (App. C, p. 53, Fdg. 48). Contrary to the Examiner, the Commission found that the power from all three dams could be marketed—by 1975—and that, if this turned out to be incorrect, the license as to the third dam could be extended or terminated (App. C, pp. 38-39). It thus implied at the same time that, if the third dam is not built, the remaining 2-dam combination will no less be "best adapted" (App. C, p. 39).

For the purposes of its § 10(a) holding, the Commission treated the 3-dam proposal as one to be privately constructed and financed. But for the purpose of comparing the power costs with those of the high dam, it held the assumption should be made, con-

trary to fact, that the Idaho Power dams would be constructed and financed by the United States (App. C, p. 32). On the basis of this unreal assumption, the Commission held that the three dams would produce power at lower cost (i.e., at a higher ratio of benefits to cost) than the Federal project (App. C, p. 36). Largely on this ground, and disregarding the greater amount of power, flood control and other benefits from the high dam, it held the Idaho Power proposal to be "best" (App. C. pp. 23, 28-30, 36, 49-50, 53, Fdgs. 10-12, 14, 18, 48).

The Court of Appeals affirmed the Commission decision, including its unreal "economic" comparison, but advanced still another interpretation of § 10(a). It held that a project need not be "best adapted" at all, but only "well adapted" or at most "better adapted" (App. B, pp. 16-17). To what? Since the Court regarded the high dam project alone as "a comprehensive plan" and the 3-dam proposal as equally comprehensive, it seems to have held that the 3-dam "plan" is "well adapted" to itself, and "better adapted" than the high dam (App. B, pp. 14-17). If the Court intended to hold otherwise, it failed to identify the comprehensive plan to which the 3-dam proposal is either "well" or "better" adapted.

All three decisions below implicitly held that "a comprehensive plan" as used in § 10(a) refers to no identifiable objective standard. None of them identified or delineated the comprehensive river-basin plan to which any or all of the Idaho Power dams could be held "best adapted"—or even "well adapted".

At the time § 10(a) was enacted, Congress contemplated that the Government would prepare specific comprehensive plans for the orderly and optimum

multi-purpose development of the Nation's river resources, whether by public or private enterprise. The Commission itself was given broad powers to investigate such resources and to obtain cooperation from other agencies in making plans for their development. But Congress did not provide the Commission with funds to perform this task; and for several years there were no plans available to guide the Commission's licensing activity. The Commission regarded the lack of specific plans as such a handicap to its statutory function that in 1922 it suspended consideration of half the license applications theretofore filed, including all applications affecting the St. Lawrence, Colorado and Columbia Rivers.[6]

In 1925 Congress called on the Secretary of War and the Commission to estimate the cost of making surveys of navigable streams with a view to formulating plans for the "most effective" multi-purpose improvement thereof. In 1927 Congress definitely assigned the task of preparing comprehensive river-basin plans to the Army Corps of Engineers. Under successive Congressional authorizations, the Army Engineers have carried out this responsibility, in cooperation with other governmental agencies, for 30 years. Over that period they have issued about 200 river-basin reports.

In 1935, when Congress reenacted § 10(a), a number of the Army's comprehensive plans had been issued and others were in preparation. No other comprehensive plans existed. No other kind was authorized or contemplated.

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[6] Federal Power Act § 4 (16 U.S.C. § 797, 41 Stat. 1065); e.g. Third and Fourth Annual Reports of Federal Power Commission (1923), p. 3 and (1924), p. 9; Second Annual Report of Federal Power Commission (1922), p. 4.

In the foregoing circumstances, petitioners contend, as a matter of law, that wherever such a comprehensive plan has been issued, it must be accepted *prima facie* as the "comprehensive plan" under § 10 (a) to guide the Commission's licensing activity.

To determine whether the Commission and Court below have properly interpreted the statutory requirement that a project be "best adapted" to a comprehensive plan, it is not necessary in this case to evaluate a host of technical considerations. Petitioners contend that, as a matter of law, no project that would supplant an economically feasible project in a comprehensive plan can qualify as "best adapted" to the plan, if it contributes less flood control, power and other benefits than the project it would supplant.

The comprehensive plan for the Columbia River Basin, as noted above, is the Army plan coordinated with proposals of the Bureau of Reclamation. It is the product of almost a quarter century of study and investigation. The staff of the Federal Power Commission participated in some of the work; and in June, 1949, the Commission itself endorsed the plan[7].

In the Hells Canyon stretch of the Snake River, the coordinated comprehensive plan calls for a multipurpose dam, 722 feet high, with a 93-mile reservoir capable of storing 3.88 million acre-feet of water for flood control, power production and other purpose. Situated in the deepest gorge on the North American continent, it would be the second highest dam in the world. To achieve maximum benefits from the project, the plan proposes that it be operated in hydraulic and electrical integration with other Federal projects in

[7] H. Doc. 531, 81st Cong., 2d Sess., Vol. I, pp. xxix-xxxiii.

the basin, especially those downstream on the lower Snake and Columbia. Eight of these downstream projects have been authorized; four are built or under construction. Water releases from the high dam would substantially increase their power production; and such increase would be credited to the high dam (App. E, p. 168, Fdgs. 125, 126).

Prior to this case, the Commission has acted consistently to protect the integrity of the comprehensive river-basin plans. In licensing proceedings and otherwise, the Commission promoted their fulfillment, by both public and private enterprise, and gauged license applications against such plans. *White River Power Co.,* Project No. 654, 1 FPC 731, 732 (1938); *Virginia Electric Power Co.,* 10 FPC 1, 87 PUR NS 469 (1951); *Portland General Electric Co.,* 10 FPC 445, 92 PUR NS 247 (1951); *Eugene Water and Electric Board,* Project No. 2059 (1955), not reported. It construed § 10(a) as looking to "full utilization of water power resources . . . and not to partial development of particular sites." *Bellows Falls Hydro-Electric Corp.,* 4 FPC 4 (1943).

The Commission has stated that under § 10(a) its responsibility is

> "to assure that the development of any part of the river will not only conserve and utilize the power values of the particular site to the fullest extent possible, but also that it will be an integral part of the comprehensive development to conserve and utilize, in the public interest, all the water resources of the entire river basin."[8]

[8] 20th Annual Report of Federal Power Commission (1940), p. 23.

In this case, however, the Commission licensed for construction in the Hells Canyon stretch three dams with about one-fourth the usable reservoir capacity prescribed in the comprehensive plan for flood control, power production and other purposes. As found by the Presiding Examiner, the three dams would produce significantly less benefits than the high Hells Canyon project (App. E, pp. 83, 117, 128, 152, 168-169, 170; Fdgs. 15, 61-78, 88-89, 94-99, 110-113, 117, 121-122, 125-126, 138-139).

In holding the three dams "best adapted to a comprehensive plan", the Commission did not employ the coordinated Federal plan, with its specific quantitative goals, as the statutory standard of judgment. It referred to the plan only in regard to the flood control and navigation goals, and then only to speculate that the Army might be able to find sites elsewhere to make up for the loss of a great part of the flood control potential at Hells Canyon. As for the power production goals, the Commission did not even mention the plan or consider how the loss of a great part of the power potential at Hells Canyon might be made up elsewhere.[9]

If this case involved no issues beyond those arising from the interpretations and applications below of the basic licensing standard of the Federal Power Act, the novelty and importance of such issues would warrant review by this Court.

b. Interpretation of § 7(b).

This case involves the interpretation of another fundamental provision of the Federal Power Act.

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[9] See App. E, pp. 158-160; Fdgs. 61-70, for the quantitative goals of the comprehensive plan.

Section 7(b) (16 U.S.C. § 800(b)), provides:

> "Whenever, in the judgment of the Commission, the development of any water resources for *public purposes* should be undertaken by the United States itself, the Commission *shall not approve any application for any project affecting such development,* but . . . *shall submit its findings to Congress* with such recommendations as it may find appropriate concerning such development". (Emphasis supplied)

Here the statutory standard is more general, turning on the phrase "for public purposes". Yet the Commission and the Court below, contrary to petitioners' contentions and the Examiner's construction of the Act, treated this standard as involving no consideration of conservation benefits beyond those to be dealt with under § 10(a) (App. C, pp. 37-38; App. B, pp. 10, 14, 16). Is this interpretation of the § 7(b) standard proper and consistent with the intent of the statute?

In the context of the Act as a whole, what considerations should or should not be given weight under the standard of "public purposes"?

Petitioners contend that avoidance of Federal "expense" is not a proper public purpose consideration under § 7(b); that the Federal development contemplated by § 7(b), by definition, involves some Federal outlay; that such outlay for a revenue-producing project is not an expense, but an investment to be substantially repaid with interest; that, in any event, the incurrence of such outlay is a matter for Congressional not Commission decision.

On this issue the decisions below were again in disagreement. The issue requires authoritative adjudication.

The Examiner decided the § 7(b) issue without reference to the matter of Federal "expense".

The Commission, however, emphasized that benefits from the Idaho Power dams "will be realized without expense to the United States" (App. C, p. 36).

The Court of Appeals tackled the question in a different way. Stressing the "greater cost", but disregarding the greater benefits of the high dam, the Court condemned it as "expensive" (App. B, pp. 14-15). It implied that avoidance of the greater capital cost of large Federal multi-purpose projects, as compared with the capital cost of smaller private projects, is a proper public purpose consideration under § 7(b).

This interpretation sharpens another fundamental statutory issue under § 7(b). Petitioners contend that § 7(b) was intended to accord the Federal Government priority in developing national water resources for public purposes. In effect, the Court seems to have held that whatever statutory bias exists is in favor of non-Federal development.

Besides optimum development for flood control, power, navigation and recreation, petitioners contend that the cost of producing the power, and hence the rate at which it can be sold and the extent to which it can serve broad economic purposes, are significant factors to be weighed as "public purposes".[10]

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[10] The relation of power costs to the regional and national economy and security is discussed in Point 3, *infra*.

In this respect, too, the decisions below produced inconsistent interpretations.

The Trial Examiner held that the cost of power to consumers is not only a proper but an important public purpose desideratum. He held the conclusion "inescapable" that the whole statute was intended to be administered "with the interest of the ultimate consumer of power as the keystone of the Act" (App. E, p. 145).

The Commission did not accept the Examiner's view. Nor did it squarely face the issue. It considered only whether cost to consumers was intended as the "sole" or "decisive" factor. Determining this question negatively, the Commission implied that cost to consumers is of little, if any, importance in weighing "public purposes" under § 7(b) (App. C, pp. 25-26).

The Court of Appeals held that cost to consumers is not "*the* criterion" under § 7(b) (emphasis supplied). Any other interpretation, it said, "would seem contrary to legislative intent" (App. B, p. 11). Thus the Court's determination would seem to imply that cost to consumers is not a public interest consideration under § 7(b) at all. Its decision made no reference whatever to the indirect economic advantages of the Federal project.

Still other basic questions of statutory interpretation and application are presented (see Points 2 and 4, *infra*). If the case involved no more than the foregoing questions, however, their novelty and importance would warrant review.

c. Administrative Significance of the Statutory Issues.

Petitioners do not ask this Court to step into the shoes of the Commission or to make or dictate an administrative decision. Petitioners do not ask this Court to choose between the irreconcilable projects. They ask this Court only to review the statutory interpretations and applications by the Commission and the Court below, to determine whether they were in error, and thus clarify the legal standards for the proper exercise of the Commission's basic responsibilities under the Federal Power Act.

Without such review and clarification, the future administration of the Act and the development of the national river resources will proceed like a ship lacking compass and rudder. This case has thrown into confusion the powers and duties of the Commission, the status and integrity of the Federal river-basin plans, the role of the Army Engineers and Bureau of Reclamation in relation to river-basin planning and construction, the future development of the Nation's river resources, both by the Federal Government and by non-Federal public and private enterprise, and the whole concept of comprehensive river-basin development.

If the Commission has discretion to ignore or tear apart a comprehensive plan in a license proceeding, no guideposts are left to achieve the Nation's established conservation policy of optimum multi-purpose development and utilization of river resources. If the decision below stands, the Army Engineers must be ready at all times to revamp their comprehensive plans to accommodate whatever conflicting individual projects the Commission may see fit to license.

So great is the confusion that in recent weeks the Secretary of the Interior has reopened the whole question as to the proper method of developing the Snake River, including parts of the Hells Canyon stretch here under consideration.

As a precedent, this case profoundly affects the future course of water resources development under the Federal Power Act, not only for the Pacific Northwest, but for every river basin in the land.

2. The Roanoke Rapids case was misread and misapplied below.

The Roanoke Rapids case (*Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953)) upheld a license for a single-purpose power project substantially *identical* with the Roanoke Rapids project in the Army's comprehensive plan for the Roanoke River Basin. This Court rejected the contention there that the Commission should have disapproved the license application and recommended Federal development under § 7(b).

In the present proceeding, the decisions below ignored the key fact of the *Roanoke* case, that the private project was virtually a twin of the single-purpose power project contemplated in the comprehensive plan. Yet the decisions below relied on the Roanoke case for their interpretation and application of § 7(b) in this case.

Idaho Power Company never proposed to build the high Hells Canyon project contemplated in the comprehensive Columbia Basin plan. It proposed a very different and lesser development, which would displace a key multi-purpose storage project recommended to Congress by the Army and Interior Departments as an integral part of the coordinated plan. Measures to

implement the recommendation had been under continuous and active Congressional consideration.

The Examiner held the conclusion "inescapable" that the Federal project would be "dollar for dollar the better investment and the more nearly ideal development of the Middle Snake". (App. E, p. 152). But he refused to recommend that findings and recommendations be submitted to Congress under § 7(b). (App. E, p. 155). He forecast that such a submission would be futile, "a completely useless action"; he held that the prospect of prompt development, even if "underdevelopment", justified his decision under § 7(b). (App. E, pp. 155, 177-78, Fdgs. 177-184). To support his position he relied on the *Roanoke Rapids* case, quoting the following sentence from this Court's opinion:

> "Particularly relevant in this regard is the estimate that public development at this site would not in the normal course be undertaken for many years." (App. E, p. 154).

Petitioners took exception to the Examiner's reliance on a political forecast and to his approval of wasteful under-development as a misuse of the *Roanoke Rapids* decision.

The Commission, without citing the *Roanoke* case, implied what the Examiner had expressed (App. C, pp. 37-38).

The Court of Appeals reverted openly to the Examiner's position. It relied even more heavily on the *Roanoke* decision. The Court seemed to treat the *Roanoke* case as authority for the proposition that the Commission's "judgments" under § 7(b) (and § 10(a)

as well)[11] are practically exempt from critical judicial review (App. B, pp. 8-9, 11-12, 15, 17-18). In upholding the Commission's assumption that Congress would not authorize the high dam, even with a § 7(b) recommendation, the Court below relied on the sentence quoted above from the Supreme Court opinion (App. B, pp. 12-14).

That sentence, however, was not written in regard to the § 7(b) issue, but to the primary issue in the *Roanoke* case, 345 U.S. 169, which was *jurisdictional* viz: whether Congressional approval of the Army's comprehensive Roanoke Basin plan had the effect of withdrawing the Roanoke Rapids site from the Commission's licensing authority. No such issue has ever been posed in this case.

Even if the quoted sentence can properly be lifted out of context and related to the Court's § 7(b) decision, it would be no authority for the Commission action here. At most, the Supreme Court held an "estimate" as to future public development is relevant where *a private single-purpose power project is the same as the project in the comprehensive plan.*

This Court's language cannot be construed to mean that the Commission can speculate on future Congressional action to justify licensing a wholly different and lesser project than that contemplated in a comprehensive plan, particularly where the Federal project is a strategic multi-purpose storage project.

Petitioners do not, and trust the Government will not, ask this Court to forecast the future course of

[11] It failed to note that the Supreme Court was not asked to, and explicitly did not, decide any question whatever under § 10 (a), 345 U.S. 153, 169.

legislation concerning development of the Hells Canyon site, especially since it involves matters of keen political controversy. The legislative story is still unfolding.[12] Past legislative history, let alone administrative projections, cannot be held to foredoom the current measures. If one or two setbacks in Congress had sealed the fate of previous Federal projects, the country today would be without TVA, Hoover, Grand Coulee and Shasta Dams.

In effect, interpretations below of the *Roanoke Rapids* decision would reduce § 7(b) to a dead letter. In the *Roanoke* case, no authorizing bill had ever been introduced or recommended. Here bills have been introduced, but thus far not enacted. If both situations equally justify the Commission in withholding a submission to Congress, § 7(b) could never come into play, since the only third possibility—actual authorization—would preclude Commission jurisdiction entirely.

If this case involved only the question whether the *Roanoke Rapids* case has been properly read and applied, petitioners submit it would be of sufficient importance to warrant review by this Court.

3. This case has irreversible impact on the economy and future of the Pacific Northwest.

The Columbia River Basin includes major parts of the states of Idaho, Oregon and Washington, por-

[12] In the 84th Congress, the Interior Committees of both Houses favorably reported authorizing bills (S. Rept. 2275, 84th Cong. 2d Sess.; and H. Rept. 2542, 84th Cong. 2d Sess. (1956)). Some months after the Commission decision, the Senate bill was defeated 41-51. Significantly, opponents of the measure relied on the Commission "judgments" contained in the license decision (e.g. 102 *Cong. Rec.* 11812-26, 11831, 12053-54, 12219, 12223, 12229 July 17-18, 1956—unbound).

tions of Montana, Nevada, Wyoming and Utah, and a part of British Columbia. Rising in Canada on the Continental Divide, the Columbia flows 1,200 miles to the Pacific Ocean. The Snake River—its largest tributary—joins the Columbia after a 1,000-mile course from Wyoming, through Idaho and Washington. The precipitous descents and large snow-fed flows make the Columbia River and its tributaries the largest potential source of hydroelectric power in the United States. One-third of the Nation's undeveloped potential lies in the Columbia Basin. While abounding in water during the spring run-off season, the region has few sites suitable for the large storage projects necessary to conserve and regulate river flows.

Industrially, the Pacific Northwest is young. Its economy is still largely based on lumbering and agriculture. Mineral and other natural resources, like the river resources themselves, lie largely untapped. The region has no significant source of energy other than water power.

For these reasons, the manner in which the Columbia Basin waterways are harnessed and developed affects the economy and future of the region and the welfare of its people. In a measure, it affects the economic strength and security of the Nation.

Storage reservoirs, associated with multi-purpose projects, regulate streamflows for flood control, power production, navigation and other purposes. The capacity of such reservoirs to store flood waters measures the region's security from frequent and sometimes disastrous inundation. At present, major floods are a recurring and serious threat to the people and property in the Pacific Northwest. Full power develop-

ment also is dependent on maximum use of feasible storage potential.

The amount of power to be produced and its cost are important, not merely for the growing needs of industrial, agricultural and other consumers, but as a dynamic factor of regional economic expansion. Some kinds of economic activity depend on the availability of large power supplies at low cost. Only with abundant low-cost power, for example, can the region's vast phosphate deposits (located largely on Federal lands) be widely developed into much-needed high concentrate fertilizer. (App. E, pp. 173-74, Fdgs. 157-160) Only with increasing supplies of such power can aluminum, certain chemical and other electro-process industries (which—along with the AEC plutonium plant at Hanford, Washington—came to the Northwest after power from Grand Coulee and Bonneville became available) be expanded, and new such industries attracted.

Thus, the extent and manner of river development will affect the development of the region's mineral, agricultural and other resources; will help determine the degree to which the region's still immature economy will be further industrialized, diversified and stabilized; will help determine the growth of business and employment opportunities and the standards of living. In short, it will shape the economic future of the region.

The manner of development will determine also to what extent new recreational areas and opportunities will be created.

In regard to these matters, the Examiner made extensive findings on the differences between the high-dam and 3-dam proposals. (App. E, pp. 165, 173-76,

Fdgs. 107-09, 157-164, 168). The Commission almost ignored them. (App. C, pp. 26-27, 50, 51, Fdgs. 19, 20, 23). The Court below ignored them completely.

Whether the decision below was right or wrong, its impact upon important resources in the public domain and upon the economy and future of a large region is such as to warrant the consideration of this Court.

As a precedent, the decision below may affect the economy and future of every river region, and thus the economy and security of the Nation.

4. The decisions below were erroneous.

In addition to the misinterpretations and misapplications of § 10(a) and § 7(b) previously indicated, the decisions below were erroneous in other material respects.

a. Further Errors of Substantive Law.

(1) As shown above, the Commission and the Court below misconstrued both § 10(a) and § 7(b) as permitting prompt underdevelopment at the expense of comprehensive development. Even this erroneous interpretation was applied arbitrarily, for the license provided that only one of the three Idaho Power dams need be built promptly. The others could be built over a period of years; one of them might be postponed indefinitely. (App. C, pp. 39, 55-56, Art. 28).

(2) The license for the 3-dam combination and the proceedings on which it rested were vitiated by the Commission acknowledgment that one of the three dams may not be built. The 2-dam combination that would actually result, if Idaho Power Company does not build the third dam, was never evaluated by the

Commission or compared with the high dam (App. C, p. 39).

(3) The Commission "judgment" under § 7(b), affirmed by the Court below, erroneously disregarded the opportunity presented by the Federal project to help finance irrigation projects through power revenues not needed to repay with interest the Government's investment in the power features. Every bill to authorize construction of the high dam has included provision for such irrigation assistance (App. C, pp. 26-27).

(4) The Commission and the Court below misconstrued and misapplied § 13 of the Act (16 U.S.C. § 806). Section 13 requires that construction of licensed project works be commenced within two years. The Commission licensed all three Idaho Power dams, but called them units of a single project; then held that only one of them need be commenced within two years. The others, it held, need not be commenced for four years and six years, respectively. In fact, as noted above, it held the third dam might be postponed indefinitely or never commenced at all. These devices, as the Examiner had held, contravened the intent and purpose as well as the plain language of § 13 (App. C, pp. 39-40; App. B, pp. 17-18; cf. App. E, pp. 108-112).

b. Basic Procedural Errors.

(1) Contrary to § 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) and § 1.30(g) of the Commission Rules (18 CFR 1.30(g)), the Commission failed to determine material issues of fact or rule on petitioners' proposed findings and exceptions. This failure, coupled with the Commission's studied silence concerning the Examiner's findings, produced the very

mischief which § 8(b) of the Administrative Procedure Act was intended to prevent. The Commission's findings, cast in general and even evasive terms, were less an exposition than a cover-up of the facts. They afforded no adequate basis for testing the Commission's conclusions. These procedures constituted reversible error. *Clarke* v. *U.S.*, 101 F Supp. 587 (1951); *Florida* v. *U.S.*, 282 U.S. 194 (1931); *U.S. et al.* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 294 U.S. 499 (1935); *I.C.C.* v. *Northern Pacific R.R.*, 216 U.S. 538 (1910).

(2) Contrary to § 7(d) of the Administrative Procedure Act (5 U.S.C. § 1006(d)) and § 1.20(k) of the Commission Rules (18 CFR 1.20(k)), the Commission relied on matters outside the record, consisting of "adjustments" of evidence, presented as "analyses" in Commission Staff Counsel's brief. These "adjustments", rejected by the Examiner, produced engineering and economic conclusions directly contrary to those of some of the very witnesses whose expert evidence was "adjusted". These extra-record "adjustments", relied on by the Commission, were never subject to cross-examination or rebuttal. Such procedures likewise constituted reversible error. *U.S.* v. *Abilene & Southern R.R.*, 265 U.S. 274 (1924); *Ohio Bell Telephone* v. *Public Utility Commission of Ohio*, 301 U.S. 292 (1937); *Morgan* v. *U.S.*, 298 U.S. 468 (1936); see *I.C.C.* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913); *Heitmeyer* v. *F.C.C.*, 95 F.2d 91 (1937); *NLRB* v. *National Laundry Co.* 138 F.2d 589 (1943).

(3) The Commission's post-license order of November 3, 1955, approving revised designs for Idaho Power's Brownlee and Oxbow projects, was made *ex parte* (App. D, p. 62; see App. C, p. 56, Arts. 29, 30).

Petitioners, although they were parties intervenor, were given no opportunity for hearing or cross-examination. Thus, two of the three dams that were ultimately approved were never tested in the adversary proceeding; they were never disclosed in the applications or the hearings. The actual design of the third dam is still undisclosed. All the Commission conclusions as to the "economics" of the 3-dam combination related to projects the design of which were never approved. The cost and economics of the dams finally approved have never been ascertained. In fact, the dams finally approved were never in the contest. Such post-decision procedures and order were unlawful. *West Ohio Gas* v. *Public Utility Commission of Ohio* (No. 1) 294 U.S. 63 (1935); *U.S. et al.* v. *B & O Southwestern R.R. Co.*, 226 U.S. 14 (1912); *Saltzman et al., Federal Radio Commission* v. *Stromberg Carlson Telephone Mfg. Co.*, 46 F.2d 612 (1931); *W. S. Butterfield, Inc.* v. *F.C.C.*, U.S. App. D.C. , #12527, Opinion dated May 24, 1956; *Enterprise Co* v. *F.C.C.*, 231 F.2d 708 (1955).

The Court below upheld the Commission procedures; without explanation, it erroneously dismissed petitioners' procedural points as "insubstantial" (App. B, pp. 17-18).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 14, 1957.

Office - Supreme Court, U.
FILED
FEB 14 1957
JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

JANUARY TERM, 1957

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

APPENDIX

To Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPENDIX A

The Statutes and Rules Involved

The relevant provisions of the Federal Power Act are:

Section 7. (b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. (16 U. S. C. Sec. 800(b); 41 Stat. 1067; 49 Stat. 842).

Section 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. (16 U. S. C. Sec. 803(a); 41 Stat. 1068; 49 Stat. 842).

Section 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the Commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct

such portion of the balance of such development as the Commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the Commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the Commission, then the Attorney General, upon the request of the Commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof. (16 U. S. C. Sec. 806; 41 Stat. 1071).

The relevant provisions of the Administrative Procedure Act are:

Section 7. (a) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such

cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (5 U. S. C. Sec. 1006(c); 60 Stat. 241).

Section 7. (d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. (5 U. S. C. Sec. 1006(d); 60 Stat. 241).

Section 8. (b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The Record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. (5 U. S. C. Sec. 1007(b); 60 Stat. 242).

The relevant provisions of the Federal Power Commission's General Rules and Regulations, including Rules of Practice and Procedure, are:

Section 1.20 (k) *Transcript and record.* Hearings shall be stenographically reported by the official re-

porter of the Commission, and a transcript of said report shall be a part of the record and the sole official transcripts of the proceeding. Such transcript shall include a verbatim report of the hearings; nothing shall be omitted therefrom except as is directed on the record by the Commission or the presiding officer. After the closing of the record, there shall not be received in evidence or considered as part of the record any document, letter or other writing submitted after the close of testimony except as provided in paragraph (j) of this section, or changes in the transcript as provided in paragraph (1) of this section, or upon motion to the presiding officer or the Commission as provided for in Section 1.12(d). (18 CFR 1.20(k)).

Section 1.30 (g) *Contents.* All decisions shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, sanction, relief, or denial thereof. There shall be stated all facts officially noticed pursuant to Sec. 1.26, relied upon in the decision. (18 CFR 1.30(g)).

[R. 2945-2958]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,988 and 13,160

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
IDAHO POWER COMPANY, INTERVENOR

On Review of Orders of the Federal Power Commission

Decided October 9, 1956

Mrs. Evelyn N. Cooper and *Mr. Lucien Hilmer* for petitioners.

Mr. John C. Mason, Assistant General Counsel, Federal Power Commission, with whom *Messrs. Willard W. Gatchell,* General Counsel, Federal Power Commission, and *Joseph B. Hobbs,* Attorney, Federal Power Commission, were on the brief, for respondent.

Mr. R. P. Parry, with whom *Messrs. Clifford E. Fix* and *A. C. Inman* were on the brief, for intervenor.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* These petitions for review, which were consolidated for hearing and decision,

attack two orders of the Federal Power Commission. The first and more important of the orders,[1] issued August 4, 1955, granted to Idaho Power Company a license to construct, maintain and operate on the Hells Canyon reach of the Snake River in Idaho and Oregon, which extends approximately 100 miles downstream from Weiser, Idaho, three water power developments known as Brownlee, Oxbow and low Hells Canyon.

The petitioners for review are eight Public Utility Districts of certain counties in Washington, the National Rural Electric Cooperative Association and National Hells Canyon Association, Inc.[2] They were not themselves applicants for the license but intervened in the proceeding before the Commission and opposed the grant to Idaho Power Company[3] on the ground that it was the duty of the Commission under § 7(b) of the Federal Power Act to decide that the United States itself should undertake the development and to recommend that Congress provide for governmental construction of a single high dam in Hells Canyon, such as had been suggested several years before by the Army Corps of Engineers and by the Reclamation Bureau of the Department of the Interior; and on the further ground that the three-dam plan proposed by Idaho Power was not, within the meaning of § 10(a) of the Act, "best adapted to a comprehensive plan" for developing the water resources of the Hells Canyon reach for public purposes.

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[1] The second order, issued November 3, 1955, merely approved revised exhibits showing the basic project designs for the three-dam proposal, which were filed by the Power Company pursuant to a requirement of the licensing order. Our ruling on the licensing order will govern this one also.

[2] The latter was organized in 1953 by certain farm and labor organizations, public power associations and rural electric cooperatives, for the purpose of opposing Idaho Power's application and advocating federal development instead.

[3] The State of Washington intervened and actively opposed the recommendation of a governmental high dam.

Having failed to persuade the Federal Power Commission to adopt their views, the petitioners ask us to set aside the grant to Idaho Power Company because, as they say, the Commission arbitrarily violated § 7(b) of the Federal Power Act[4] by failing and refusing (a) to conclude that the development of the water resources involved should be undertaken by the United States, and (b) to "cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary," and to "submit its findings to Congress with such recommendations as it may find appropriate concerning such development." The petitioners contend not only that the Commission had no choice but to decide for federal development, but also that it was bound to recommend that it be accomplished by the construction of the one high dam which had been suggested by the other two federal agencies. Had the Commission's judgment been that the Government should undertake the development—as the petitioners say it should have been—it would have been required by § 7(b) to withhold approval of Idaho Power's applications for at least two years. Federal Power Act, § 4(a).

Petitioners further assail the grant to Idaho Power on the ground that in making it the Commission arbitrarily

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[4] Section 7(b) of the Act—41 STAT. 1067, as amended 49 STAT. 842, 16 U. S. C. § 800(b)—is as follows:

"(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

violated § 10(a) of the Act[5] in finding the applicant's three-dam proposal to be "best adapted to a comprehensive plan" for developing the water resources of the Hells Canyon reach for public purposes. The suggested federal high dam is "best adapted," they say, for those purposes.

We observe that the admonitions to the Commission contained in § 7(b) become effective only when "in the judgment of the Commission" the development should be undertaken by the Government. In like manner, § 10(a) provides that any license issued shall be on condition that the project adopted shall be such as "in the judgment of the Commission" will be best adapted to a comprehensive plan for developing the water resources for beneficial public uses. The recurrence of the quoted phrase emphasizes the broad discretion as to these technical matters which Congress has committed to the Commission. "Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine," said the Supreme Court in the Roanoke Rapids case,[6] "so long as it cannot be said . . . that the judgment which it exercised had no basis in evidence and so was devoid of reason."

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[5] Section 10(a) of the Act—41 STAT. 1068, as amended, 49 STAT. 842, 16 U. S. C. § 803(a)—provides:

> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

[6] Chapman v. Federal Power Commission, 345 U. S. 153, 171 (1953).

Accordingly, our view of the Commission's orders in these cases is quite limited in scope. When we have determined whether the agency violated constitutional or statutory provisions, and whether its decision had a substantial basis in the evidence considered in its entirety, we are done.

Although Idaho Power Company was the only applicant for a license to develop the water resources of the Hells Canyon reach, the Commission conducted what was in effect an adversary hearing for the purpose of comparing the privately proposed three-dam plan with the single high dam installation which had been suggested. The hearing lasted a year or more. Many experts testified as to the engineering and economic aspects of the two plans and a great mass of proof was received. A comprehensive, carefully considered proposed decision was filed by the presiding examiner, after which the Commission handed down a lengthy opinion which contained more than fifty greatly detailed findings of fact upon which the ultimate decision to grant the license was based.

The Commission found that the three dams—Brownlee, Oxbow and low Hells Canyon—will develop the 602 feet of head in the Snake River's Hells Canyon reach. Brownlee will have a maximum head of 277 feet, usable storage of 1,000,000 acre-feet, and an initial installation of 360,400 kilowatts with provision for an additional 180,200 kilowatts. Oxbow will have a head of 117 feet, usable pondage of 6,200 acre-feet, and an initial installation of 151,000 kilowatts with provision for an additional 75,500 kilowatts. Low Hells Canyon will have a head of 208 feet, usable pondage of 11,200 acre-feet, and an initial installation of 272,000 kilowatts with provision for an additional 136,000 kilowatts.

The high concrete arch dam suggested for federal construction also would develop the 602 feet of head. There would be eight 100,000-kilowatt generating units initially

with provision for one additional 100,000-kilowatt generating unit, a total storage capacity of 4,400,000 acre-feet of which 3,880,000 acre-feet would be active storage, a spillway with a capacity of 300,000 cubic feet per second, and an operating head at the power plant varying from a maximum head of 602 feet to a design head of 475 feet and thence to a minimum head of 313 feet.

The Commission received evidence as to the cost of both plans. Estimates of the cost of such large installations are of course elaborate and complicated. It is sufficient for present purposes to summarize by saying the three-dam development will probably cost about $175,000,000, while the high dam suggestion would probably run to something more than twice that sum.

In order to decide, as required by § 7(b), whether, in its judgment, the development should be undertaken by the United States, the Commission compared the evidence as to the public purposes which would be achieved by the three-dam installation privately proposed, and by the suggested federal high dam advocated by the petitioners. It concluded that "the public purposes such as flood control, navigation and recreation could be effectuated to about the same extent under either plan of development." This left for consideration and comparison the production of power.

The Commission regarded it as essential, in deciding between the two plans as to power production, to compare the economics of the proposals, since power benefits constitute about 85 per cent of the total benefits to be derived under either plan. It therefore made the comparison, discussed it at some length in its opinion, and reached this conclusion:

> "After full consideration of the comparative economics of the power features of the one-dam and the three-dam plans as presented by the evidence of record and as analyzed in the several briefs filed herein

we conclude that, assuming financing, construction and operation of both plans by the same entity, the ratio of power benefits to power costs of the three-dam plan is greater than that for the one-dam plan, and although the high Hells Canyon Project would produce a greater amount of power than the three-dam plan, the additional amount of power that could be produced by the high Hells Canyon Project would have a benefit-cost ratio of about one to one. Consequently the power features of the one-dam plan have no clear economic advantage over those of the three-dam plan."

It is contended the Commission erred in comparing, for § 7(b) purposes, the two plans as though they were to be undertaken by the same entity. It is insisted that the two proposals should be compared on the basis of private construction of the three-dam installation and federal construction of the one high dam, from which it would follow that the power from the latter could be marketed at a much lower cost due to the Government's superior credit and its freedom from taxation. If this were the criterion under § 7(b), federal development would invariably be preferable and the Commission's authority to issue licenses to private applicants could never be exercised without first recommending the proposals for federal construction and waiting for two years to see whether Congress would authorize the work. This would seem contrary to legislative intent, as § 7(b) requires the Commission to recommend federal development only when "*in the judgment of the Commission*" the work should be undertaken by the United States itself. The italicized phrase is read out of the statute if the Commission must recommend every development for federal construction simply because the United States has better credit than any private applicant and is free from taxation.

Finally, the Commission's opinion announced that "it is our judgment that the United States itself should not

undertake the development of the water resources of the Hells Canyon reach of the Snake River for public purposes." From the foregoing, it appears the judgment was reached by comparing the physical aspects and results of the two plans, with reliance also on economic features.

Another consideration influenced the decision of the Commission: the little likelihood that federal development would be authorized in the foreseeable future. "Particularly relevant in this regard," said the Supreme Court in the Roanoke Rapids case,[7] "is the estimate that public development at this site would not in the normal course be undertaken for many years."

That this was the case was apparent to the Commission from the legislative history of the suggested federal high dam. In February, 1950, the Army and the Interior Department submitted to Congress their suggestions for federal development of water resources in the Columbia and its tributaries, including the Hells Canyon high dam on the Snake River. The suggestions were in such great detail as to fill ten volumes, and included financial studies, maps, plans and drawings. Following these filings, several bills to authorize Hells Canyon and other projects were introduced in the 81st Congress. During debate in April, 1950 amendments to authorize a federal dam at Hells Canyon, alone and in combination with other projects, were tabled. In the 82nd, 83rd and 84th Congresses the high dam proposal was pressed upon Congress but met a similar fate. Although the legislators have been aware of the fact that Idaho Power Company had applied to the Commission for a license to develop the Hells Canyon water resources, they have consistently refused to approve, adopt or authorize federal construction of the suggested high dam or any other projects,

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[7] Chapman v. Federal Power Commission, 345 U. S. at 169.

and so have not preempted the Hells Canyon reach of the river for governmental development.[8]

The thoughtful comments of the trial examiner on this subject seem particularly apt:

> "Some of the interveners in this matter seemingly have the idea that all that would be needed to assure the authorization and appropriation for the High Dam Project by Congress would be for the Commission to reject the applications herein in their entirety and take appropriate action under Section 7(b). While the Congress might be expected to give consideration to such a recommendation, it is doubtful in the circumstances—where Congress has been giving consideration to development of the Middle Snake River for a number of years—that any expression by this Commission on the subject would have any appreciable effect.
>
> "I conclude that, on the basis of facts before me, including the legislative history of the various Hells Canyon bills which have been heretofore presented to the Congress without success, the likelihood of the authorization of and appropriation for an undertaking of the size involved in the High Dam Project is so remote as to make a recommendation to Congress under Section 7(b) that such a dam be undertaken by the United States a completely useless action. Such action, which in these circumstances could not be expected to produce more results than any of the bills which have been introduced and sponsored in the past by the Secretary of the Interior and various energetic legislators, would serve only to freeze the

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[8] Section 14 of the Federal Power Act, 16 U. S. C. § 807, protects the public interest, in case Congress hereafter decides it is desirable for the Government to own and operate Idaho Power's installations, by providing

> ". . . That the right of the United States . . . to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved."

Middle Snake River for hydroelectric development for an indeterminate period in the future. Just as the Examiner and Commissioner in the Roanoke Rapids case were convinced of the need to harness the waters of the Roanoke River at earliest practicable date, I am convinced that the non-utilization of water resources could be in some circumstances just as short-sighted as less than maximum development. Keeping the consumer in mind—if the denial of all of the applications herein would have only the practical result of driving the Idaho Power Company to a steam-electric program at a much higher cost and with resultant increases in rates for power—I am doubtful that such action would be in the public interest. Only if such denial were to pave the way for lower cost power for those consumers would I believe such a denial would be in the public interest. I do not feel that it would be in the public interest for the Commission to take any steps the practical effect of which would be to delay indefinitely the use of these waters for power purposes and for the other purposes that would be served by the development of the water resources."

In sum, the Commission concluded that neither plan was more comprehensive than the other in the public purposes to be served; and that the fact that the single high dam would produce these public benefits in somewhat greater quantity than would the private proposal did not justify the formation of a judgment that the United States should undertake the former, in view of its greater cost and the improbability of its earlier authorization. Thus the Commission chose between a $400,000,000-plan, which nobody was offering to undertake, and another comprehensive development for which private capital in the sum of $175,000,000 is immediately available, so construction can begin at once. In fact it is probable that construction has already begun, as the Supreme Court within recent weeks denied our petitioners' application for a stay pending judicial review.

In the circumstances which appear here, we think it appropriate to adopt the language of the Supreme Court in the Roanoke Rapids case:[9]

> "... [W]e do not find merit in the contention that the Commission was required by § 7(b) of the Federal Power Act to recommend public construction of the project. ... Petitioners in effect ask us to tell the Commission what it thought—to say to the Commission that it was its judgment that [Hells Canyon] ... should be built by the Government. ... Primary responsibility for the enforcement of the provisions of § 7(b) must remain with the Commission; we cannot infer a judgment of the Commission that it never expressed and now specifically disavows."

Having decided not to recommend Government construction of the expensive high dam, the Commission carefully considered the Idaho Power three-dam proposal and found as a fact that, within the meaning of § 10(a), it "is best adapted to a comprehensive plan for improving or developing a waterway ... for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." This finding is attacked by the petitioners, as we have said. Though the Commission, under § 7(b), had rejected the suggested federal high dam, they insist it should be considered under § 10(a) as "best adapted to a comprehensive plan" etc. They say, "The Commission unlawfully disregards the Main Control Plan of the Federal comprehensive plan as the standard of judgment under § 10(a)." Thus they seem to regard the high dam suggestion as a federally adopted comprehensive plan which binds the Commission to hold it is "best adapted" for the purposes of § 10(a), although as we have seen it has not been authorized, adopted or even approved by Congress after more than six years of consideration.

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[9] Chapman v. Federal Power Commission, 345 U. S. at 172-3.

The petitioners speak of the statutory word "comprehensive" as being a superlative and argue that the high dam suggestion must be considered *the* "comprehensive" plan because it would produce public benefits in greater measure albeit at tremendously greater cost. The word "comprehensive" is not superlative in significance. We have already seen that the three-dam proposal and the single high dam suggestion are equally comprehensive as to the achievement of public purposes.

But aside from that, we seriously doubt whether § 10(a), which attaches conditions to the issuance of a license under § 4(e), was intended by Congress to require the Commission to compare a suggested but rejected federal plan with pending private proposals, to see which is "best adapted to a comprehensive plan" of development. Such a comparison is made under § 7(b) when the Commission decides whether in its judgment the United States should undertake the construction and in doing so of course employs standards which include those set out in § 10(a). The Act must be read and applied as a whole.

We have seen that § 10(a) has to do with licenses issued under § 4(e) and prescribes conditions to which they must be subject. It comes into play only after the Commission has decided against federal construction and so has turned to the consideration of applications for licenses therefor under § 4(e). We do not agree that a suggested plan of federal development, which has been rejected by the Commission under § 7(b), must be used by it as the standard of judgment under § 10(a).

The purpose of that section is to insure that a private proposal be not licensed unless it is "best adapted" etc. The word "best" is of course superlative and suggests comparison of two or more applications for licenses under § 4(e). But when, as here, the suggested federal development has been rejected and there is only one private pro-

posal for consideration, § 10(a) can only mean that it shall not be licensed unless it is found, in the judgment of the Commission, to be well adapted to a comprehensive plan for the development of the water resources.

If it should still be argued, however, that in forming its judgment under § 10(a) the Commission must reject a private proposal which is presently available and which is well adapted to a comprehensive plan merely because a suggested federal plan, which it has already justifiably refused to recommend, is said to be better adapted to a comprehensive plan, the considerations which moved its § 7(b) decision again become important. In that event, the practical economic aspects of the two plans and the prospect of immediate construction become large factors in the process of deciding which is "better adapted." Again, we cannot substitute our judgment for that of the Commission concerning the technical questions which were before it.

The Commission did not act hastily in this matter. Idaho Power's first application was filed in 1950 and the others in 1953. And it was not until 1955 that the project was licensed, after the mature consideration we have described. We are not willing to accept the petitioners' characterization of the Commission's action as "administrative lawlessness." On the record before us, it may be the Commission could properly have concluded that the high dam project was appropriate for federal development. But the decision was for the Commission, not for us. Our task is to say whether the Commission was under a duty, in applying the law to the facts of record, to reach that conclusion instead of the one it did reach. Clearly we cannot so hold.

Other contentions of the petitioners, such as that the licensing order violates § 13 of the Act, which limits to four years the time within which licensed construction must be completed, have been considered but are regarded

as in substantial. We find no instance in which the Commission went beyond the confines of the Constitution or the governing statute; and we think that on the whole record "it cannot be said . . . that the judgment which it exercised had no basis in evidence and so was devoid of reason."[10]

Affirmed.

[10] Chapman v. Federal Power Commission, 345 U. S. at 171.

[R. 2959]

Filed October 9, 1956

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Judgment

These cases came on to be heard on the record from the Federal Power Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this Court that the orders of the said Federal Power Commission on review in these cases be, and the same are hereby, affirmed.

Dated: October 9, 1956.

Per Circuit Judge Wilbur K. Miller.

[R. 2817-2843]

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 283

Projects Nos. 1971, 2132 and 2133

In the Matters of

IDAHO POWER COMPANY

APPEARANCES

For the Applicant, Idaho Power Company
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R. P. Parry and Clifford Fix

For the Interveners, National Hells Canyon Association, Inc., and Lewis County, P.U.D., et al.
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For the Staff of the Federal Power Commission
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For Idaho Oregon Hells Canyon Association
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For American Farm Bureau Federation
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Chester C. Dustin

For Steck Motor Company and Other Enterprises
Kenneth Steck

For Snake River Free Enterprise Association of Weiser, Idaho
Gene E. Stanford

For Lake Reservoir Company and Various Other Companies
James A. McClure

For Certain Petitioners Requesting That the Hells Canyon Dam Site Be Reserved
Mrs. Gracie Pfost
Member of Congress
First District, Idaho

For Snake River Free Enterprise Association of Baker, Oregon
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Opinion No. 283

Opinion and Order Issuing License (Major)

Idaho Power Company, of Boise, Idaho, filed applications for licenses under Section 4 (e) of the Federal Power Act for authority to construct, operate and maintain three water-power developments on the Snake River in Idaho and Oregon. These proposed developments are known as Oxbow, designated as Project No. 1971, low Hells Canyon, Project No. 2132, and Brownlee, Project No. 2133. The application for Oxbow was filed on December 15, 1950, and the two applications for the others were filed on May 15,

1953. All three applications were supplemented by later filings.

These developments are referred to as the three-dam plan, and would be located in the so-called Hells Canyon reach of the Snake River which extends for approximately 100 miles downstream from Weiser, Idaho.

The developments, each having a rock-fill dam, would develop the 602 feet of head in the Hells Canyon reach. Brownlee would have a maximum head of 277 feet, usable storage of 1,000,000 acre-feet, and an initial installation of 360,400 kilowatts with provision for an additional 180,200 kilowatts. Oxbow would have a head of 117 feet, usable pondage of 6,200 acre-feet, and an initial installation of 151,000 kilowatts with provision for an additional 75,500 kilowatts. Low Hells Canyon would have a head of 208 feet, usable pondage of 11,200 acre-feet, and an initial installation of 272,000 kilowatts with provision for an additional 136,000 kilowatts. Thus, the developments would, if constructed, add 783,400 kilowatts of installed capacity initially to the area.

The National Hells Canyon Association, Inc., (composed of labor organizations, public power associations, REA Cooperatives, and farmers' organizations); Lewis County Public Utility District of Washington and seven other Utility Districts in that State; and the National Rural Electric Cooperative Association, hereinafter referred to as Interveners, oppose construction of the three developments and have contended throughout the proceedings that the Hells Canyon reach of Snake River should be developed by the high Hells Canyon Project to be constructed by the United States. At the oral argument counsel for Interveners took the position that the Commission has no choice but to recommend the high dam to Congress for Federal development.

The high Hells Canyon Project under consideration here was originally proposed by the Bureau of Reclamation,

United States Department of the Interior (House Document No. 473, 81st Cong., 2d Sess.), but its physical characteristics are substantially the same as a project by the same name proposed by the Corps of Engineers, Department of the Army in its review report on the Columbia River and its tributaries (House Document No. 531, 81st Cong., 2d Sess.).

The Hells Canyon Project, referred to as the one-dam plan, would develop the 602 feet of head in the Hells Canyon reach of Snake River by means of a concrete dam creating a reservoir with usable storage capacity of 3,880,000 acre-feet. The initial installation would be 800,000 kilowatts with provision for an additional 100,000 kilowatt unit.

In addition to the so-called three-dam plan and the one-dam plan, evidence was presented with respect to a two-dam plan and it was analyzed and discussed to some extent in the briefs of the parties. Briefly, the two-dam plan would develop the same 602 feet of head and would consist of the Brownlee development and an intermediate Hells Canyon development with a reservoir extending upstream to Brownlee.

We have considered the record relating to the two-dam plan which is substantially the same as the three-dam plan with respect to economics, benefits and public purposes, but which is not being seriously proposed by any responsible parties. Hence, we see no reason to give it further consideration.

In this, as in other licensing cases, the Commission is charged with the duty of determining what is the best plan of development. In addition we are called upon, under Section 7 (b) of the Federal Power Act,[1] to exercise our

[1] *Section 7 (b).* Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such

judgment to determine whether development of the water resources involved should be undertaken by the United States for public purposes, and if we so find, the case is at an end insofar as the pending applications are concerned since Section 7 (b) requires that we disapprove them. Our only remaining duty would be to recommend to Congress that the United States construct the development which in our judgment appeared to be the best one.

On the other hand, if we do not find that the United States should undertake the development, Section 10 (a) of the Act[2] requires that licenses shall be issued only for those power projects which in the judgment of the Commission are best adapted to comprehensive plans for development of those streams subject to Federal jurisdiction and, of course, in the present case other benefits than power production can be secured by utilization of the water resources of Snake River.

Thus, we must consider not only the power production inherent in the two plans before us, but we must also consider power in relation to the flood control, navigation, and other public purposes to be served by either plan of development.

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development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

[2] *Section 10.* All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

In connection with contentions made by the parties with respect to Section 7(b), some reliance has been placed upon the Commission's letters of June 21, 1949, to the Chief of Engineers, Department of the Army and to the Commissioner of Reclamation, Department of the Interior commenting upon their respective reports on a comprehensive plan for developing the Columbia River and its tributaries.

Interveners seem to think those letters endorsed the plans then presented for comment, but we believe the Commission's decision *In the matter of City of Tacoma, Project No. 2016,* 10 F.P.C. 424, 427-8; 92 PUR NS 79, 82 correctly states the import of those letters. There we said:

> The Commission has neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power in commenting upon such comprehensive plans of the Army Engineers as were submitted in 1948 * * * Upon the filing of the instant application, however, the responsibilities assigned to the Commission under the Federal Power Act * * * required full and impartial evaluation of the applicant's proposal on its merits and the objections thereto, * * *

That statement correctly describes the Commission's responsibility in the instant proceedings and, of course, the Commission could not be precluded from carrying out its statutory duties under the Federal Power Act because of its letters of comment written on a voluntary and cooperative basis in accordance with the established procedures of the Federal Inter-Agency River Basin Committee, a body without statutory authority.

One reason urged in support of the contention that we should recommend Federal development of the Hells Canyon water resources is that the lower cost power resulting from Federal development, as compared to private development, is needed in the area to attract industry, such as aluminum producers, to aid in development of

phosphate resources on public lands, and to supply lower cost power to preference customers to meet their growing loads. In this connection Interveners contend that such lower power costs are an important factor to be taken into account in arriving at a decision under Section 7 (b) of the Act but they do not claim that this factor is necessarily a decisive one.

There is no provision in Section 7 (b) or in any other section in the Act which leads us to believe that Congress intended that we recommend Federal development for the sole purpose of making power available at costs lower than would be possible if the same water resources were developed by a private entity under a license. Needless to say if the supplying of power at the lower costs resulting from Federal development should be considered as a decisive factor, there would be few cases involving major power projects where private development could be licensed under the Act because of the substantial difference in annual cost of investment money in favor of Federal over private financing and because of the much higher annual cost of taxes paid under private development as compared with the freedom from taxes under Federal development or, in some few instances, the minor annual payments by some Federal projects in lieu of State taxes.

Interveners state that the "irrigation aspect alone of the Helis Canyon proposal would justify a Commission recommendation for Federal development". Of course, the record shows that none of the developments under consideration would supply any water for irrigation of lands and Interveners admit this. The sole manner in which the high Hells Canyon Project could be related to irrigation would be by the use of power revenues from that project to assist in the payment of irrigation costs in excess of the ability of the irrigationists to pay.

Whether irrigation should be subsidized and, if so, the method of subsidy is a matter for Congress to decide and

not the Commission. In recent reports to Congress concerning bills to authorize power and irrigation projects the Commission has confined its comments on the matter of subsidy to a recommendation that all power costs be returned to the United States with interest prior to any other use being made of those revenues. Under the circumstances no further consideration need be given to this aspect of the case.

In evaluating any plan for development of the Middle Snake River it is essential to take notice of the review report on the Columbia River and its tributaries, prepared in 1948 by the Corps of Engineers and printed as House Document No. 531, which we have previously mentioned. This report contains the results of a comprehensive basin-wide study in which the various possibilities for efficient utilization of the water and related land resources for navigation, flood control, irrigation, power and other purposes were considered and evaluated. This report recommended authorization for Federal construction of a so-called main control plan involving several major multiple-purpose projects on the main stem of Columbia River and on certain tributaries, including the portion of Snake River now under consideration. The principal objective of this plan is to limit the flow at The Dalles on Columbia River to 800,000 cubic feet per second should the maximum flood of record, which occurred in 1894, again occur.

The main control plan as proposed in House Document No. 531 would provide 26,990,000 acre-feet of storage capacity usable for flood control. This control plan included 14 projects among which were Glacier View and Hells Canyon, and it is only 26 percent complete or under construction. A method of operation has been prepared for the storage reservoirs in this plan which would make it possible to achieve reductions in flood heights in the lower Columbia River and in those areas downstream from each project that have suffered flood damage in the past. However, new studies made by the Corps of Engineers since 1948 indi-

cate that some changes have been made in the plan since it was formulated in that year and other changes are contemplated.

Opposition to the Glacier View project has caused its elimination from present studies, and proposed plans call for increasing the storage at Libby project from the 4,250,000 acre-feet originally planned to 5,010,000 acre-feet. In addition, Bruces Eddy and Penny Cliffs projects on the Clearwater River, which were not included in the Army's main control plan, are now under consideration and they would have a combined flood control storage capacity of 3,700,000 acre-feet. The Clearwater and Salmon Rivers, which discharge into the Snake River below the Hells Canyon reach, are the two principal flood producing streams in the Snake River Basin and the former is one of the worst flood producers in the entire Columbia River Basin. The flow of these two rivers is unregulated at the present time.

The Pleasant Valley project, now being studied and investigated, would provide storage on the Snake River downstream from Hells Canyon which would be usable for flood control.

Thus, it is apparent to us that control of the flood flows of the Columbia River can be accomplished by a number of different combinations of projects distributed in the major streams of the Columbia River Basin.

In considering the flood control features of the Applicant's proposal, the record shows that the one-dam plan would provide the 2,300,000 acre-feet of the flood control storage the Army contemplates in the Hells Canyon reach of the Snake River in connection with its plans to control the maximum flood of record at The Dalles on the Columbie River. The Applicant's three-dam plan would provide at least 1,000,000 acre-feet of storage for flood control and, consequently, if Applicant is to be permitted to construct its developments, an additional amount of flood control

storage would have to be provided elsewhere. We have previously pointed out some possibilities of providing this storage, although its relative cost is not shown. However, we are convinced from the record that the provision of such storage should not be a problem from the standpoint of availability of other sites.

At the present time there are reservoirs in the Snake River Basin located upstream from the Hells Canyon reach which have a total usable storage capacity of about 8,500,000 acre-feet. This storage is equal to about two-thirds of the average annual flow of the Snake River at Weiser, Idaho. Although this upstream storage is operated primarily for irrigation, flood waters are stored in the normal course of their operation with the result that they provide some regulation of flood flows.

The Department of the Army, the agency principally concerned with flood control, has not objected to the Applicant's proposal to provide 1,000,000 acre-feet of flood control storage at Brownlee site in lieu of the 2,300,000 acre-feet that might be provided at the Hells Canyon site. In addition, the Department of the Army has recommended license conditions which would require Brownlee to be operated under the Army's direction for flood control purposes.

We are convinced that the immediate construction of the Brownlee project would be consistent with the Army's present plans to control floods on the Lower Columbia River. With existing upstream storage in the Snake River Basin, the 1,000,000 acre-feet of flood control storage at Brownlee would be adequate to control the Snake River runoff for the second greatest flood of record, that of 1948.

In deciding what constitutes the best plan, we have also considered the matter of navigation on the Columbia and Snake Rivers.

Navigation benefits attributable to the one-dam plan consist of (1) estimated savings due to traffic on the Hells Canyon reservoir, (2) estimated savings due to reduced dredging that would be required on Snake River above Lewiston, Idaho, and (3) estimated savings because of reduced dredging on Columbia River below Bonneville.

Navigation benefits attributable to Applicant's three-dam plan consist of (1) estimates of savings due to traffic on the three reservoirs or pools and (2) improved navigation conditions in the open river channel between Lewiston and the mouth of Salmon River resulting from releases of water from Brownlee reservoir.

The estimates of the Corps of Engineers of the total annual navigation benefits attributable to the one-dam plan range from $189,000 to $250,000 annually and for the three-dam plan the range is from $108,000 to $150,000 annually. Thus, it is apparent that the navigation benefits of the one-dam plan or the three-dam plan are relatively insignificant from an economic standpoint when compared with the overall benefits to be provided by either plan. When comparing the two alternative plans, the navigation benefits are small and so similar in amount as to have no discernible effect.

In considerating the recreational aspect of the two alternative plans, it is apparent from the record that if reasonably good access roads are provided in the Hells Canyon area, it will become an important recreational attraction no matter what plan of power development is put into effect, and, of course, recreational facilities would have to be provided to accommodate visitors. Either plan would have favorable recreation features such as boating, swimming and lake-side developments. Insofar as fishing and hunting are concerned, the three-dam plan would probably be superior, but on an over-all basis the high Hells Canyon Project would probably attract the larger number of out-of-State tourists because of its size. Either

plan would require the expenditure of some funds for recreation facilities and the record indicates that the larger amount would be spent under the one-dam plan.

Any power development would adversely affect the fish and wildlife resources of the area, and particularly the anadromous fish. Under either plan proper measures for the conservation of those resources could and would be taken, and it is assumed by all parties that about $5,000,000 would be required for the fishery program, exclusive of a low barrier dam which may be needed as part of the fish program. In addition, some funds will be required to provide substitute wildlife areas to replace those existing ones which will be flooded.

The Hells Canyon reach of Snake River has archeological and historical remains which should be salvaged. The record shows that this could be done at nominal cost under either plan.

We conclude that the public purposes such as flood control, navigation, and recreation could be effectuated to about the same extent under either plan of development.

This leaves for consideration the matter of power production. In order to decide which is the best plan it is essential that a valid comparison be made of the economics of the power production function of each plan. This is a particularly important public purpose since power benefits constitute about 85 percent of the total benefits to be derived under either plan. This comparison is almost entirely an economic one.

The usual procedure for making an evaluation of a proposed project or projects consists of a series of estimates and computations resulting in two monetary items, namely power costs and power values, which are to be compared. When the comparative economics of two or more mutually exclusive plans are to be determined, it is essential that all plans be compared on as similar a basis as is possible

from the record, and this would include the use of the same assumed basis of financing, whether that be private financing or Federal financing.

Interveners would have us make an economic comparison of the power benefits of the two plans on the assumption of Federal financing for the one-dam plan and private financing for the three-dam plan. Such a comparison would be of little value in determining which plan would be more economic for either Federal construction or private construction.

If power costs and power values are to be stated on a unit basis, it is necessary to arrive at some unit of output for each plan. In arriving at the output of the two alternative plans for purposes of comparison, the most important consideration is that the output figure used for each plan shall have been estimated upon the same assumptions, such as length of the critical period, magnitude of assumed decrease in stream flow in future years due to increased consumption of water in irrigating lands now receiving no water or insufficient water, the number of downstream power plants in operation, and the volume of storage available in the Columbia River Basin. The record contains prime power output estimates for each plan based on comparable assumptions and there are other estimates of output expressed in terms other than prime power.

The length of the critical period[3] used by the several witnesses in estimating the power output of each plan

[3] A critical period is that historical part of time, within the longer period being considered, during which the largest volume of stored water would have been needed, when most efficiently used in combination with the historical or recomputed annual stream flow to maintain a stipulated continuous or average release of water, or a stipulated output of prime power, at a specified power site or combination of power sites. (House Document 531, p. 4134). In a system critical period, the total usable storage from all reservoirs in the system is released to produce maximum system prime power. This would be equally true for a critical period of any length.

ranges from seven months to 42 months. The length of the critical period for the existing reservoir system in the Columbia River Basin is a seven-month period during which it is assumed that stream flows would be substantially similar to those which occurred from September 1936 to April 1937. It is well recognized that as additional storage projects are constructed in this region the length of the critical period will increase. In this connection it is noted that the Corps of Engineers, in House Document No. 531, indicates that with the Phase C system of projects in operation (19,758,000 acre-feet of usable storage) the critical period will extend over a 30-month period. Also, the Corps indicates that with the Phase D system in operation (43,741,000 acre-feet of usable storage) the critical period will extend over a 42-month period. Since it is logical to assume that additional projects involving storage will be constructed in the region within the foreseeable future, it follows that the critical period which determines the prime power output will increase in length from the present seven-month period. The evidence in the record shows that it would be reasonable to assume a critical period of from 23 to 34 months to reflect a 50-year average for computing the prime power output for each plan of development.

By 1980 substantial additions of fuel-electric capacity should be economical in the Pacific Northwest and the addition of such fuel-electric capacity would result in a significant change in the method of operation of hydroelectric projects, particularly storage projects. The addition of such capacity should have the effect of shortening the critcial period and it is unlikely that the 42-month critical period contemplated for an all-hydro system by House Document No. 531 will prevail for any length of time, if at all.

The estimates of water supply available for power production are based on U. S. Geological Survey records cor-

rected for estimated decreases in stream flow due to estimated increases in irrigation in the future. In this connection there was a considerable difference of opinion among the witnesses regarding the average number of additional acres to be irrigated over the next 50 years. Although some effect upon stream flow will result from the addition of new irrigable lands in the basin, the record clearly shows that such an effect would not be significant insofar as the power potentialities of the Hells Canyon reach of the Snake River are concerned.

The only estimate of the construction cost of the high Hells Canyon Project available in the record was presented by staff counsel through witnesses from the Bureau of Reclamation. However, several witnesses used these cost estimates in estimating capital costs and annual costs for the one-dam plan for purposes of their studies.

The Applicant, the Commission staff and witnesses from the Bureau of Reclamation presented construction cost estimates of the three-dam plan, although the Bureau witnesses based their higher cost estimates principally upon concrete dams rather than rock-fill dams as proposed by Applicant.

To arrive at an estimate of the power cost of a proposed development, assuming Federal financing, either on an annual dollar basis or on a unit cost basis, it is customary to begin with an estimate of construction cost as given in the record. Such construction cost figure is translated to an estimate of capital cost by the addition of an estimate of a dollar amount representing interest during construction. The next step is to apply to the capital cost appropriate percentages to obtain dollar amounts to cover such annual cost items as interest, amortization, insurance, and payments in lieu of taxes. To such figures, dollar amounts are then added to cover the cost of interim replacements, and annual operation and maintenance expenses. The sum of the dollar amounts for each of the foregoing items

ılts in the dollar estimate of the annual cost for a posed project. If from the total of the foregoing lar amounts there is subtracted the total estimated lar amount of annual non-power benefits, the difference resents the estimated dollar amount chargeable to elec- power production attributable to a proposed project. his dollar amount is divided by the estimated number units of power output, e.g., the kilowatts of prime ver, the resulting figure is an expression of the unit t of power output attributable to a particular project. imates for each plan of development were derived from record in accordance with this method and were pre- ted in the staff's brief. Varying estimates of the unit t of power output are included in the record.

The estimate of the power value is usually based on the ivation of the annual cost and of the unit cost of an ivalent power supply from an alternative source. The ernative source may be other hydroelectric projects, or am-electric generating stations, or a combination of h. Whatever the alternative source or sources of power pply may be, the annual cost used as the power value the project under study is usually derived in the same cedural manner as is the annual power cost of the ter-power project being considered for development. imates of power values are included in the record and er such estimates have been derived from data in the ord.

In addition to estimates of power costs and power ues, the staff has presented comparative economic dies in which adjustments were made to take into ount the differences, expressed as percentages, between imates of direct costs (exclusive of contingencies) and imates of construction costs (before interest during con- uction), as used by Bureau witnesses in their cost esti- tes for the high dam on the one hand and as used by the mmission staff in its cost estimates for the three-dam

plan. Also, some staff analyses have taken into account differences in cost estimates for the two plans resulting from inclusion of cost items in one estimate which do not appear in the estimate for the other plan.

The estimates of power costs and power values attributable to each plan and used for comparative purposes vary depending upon the assumption made and methods of evaluation used by the several witnesses who made economic studies. We have considered the several methods discussed in the record as well as those used in studies made by the witnesses.

After full consideration of the comparative economics of the power features of the one-dam and the three-dam plans as presented by the evidence of record and as analyzed in the several briefs filed herein we conclude that, assuming financing, construction and operation of both plans by the same entity, the ratio of power benefits to power costs of the three-dam plan is greater than that for the one-dam plan, and although the high Hells Canyon Project would produce a greater amount of power than the three-dam plan, the additional amount of power that could be produced by the high Hells Canyon Project would have a benefit-cost ratio of about one to one. Consequently the power features of the one-dam plan have no clear economic advantage over those of the three-dam plan.

Whether development of the Hells Canyon reach of Snake River be by a Federal or a non-Federal entity, the public purposes to be served by either alternative plan would include flood control, navigation, power generation, recreation and conservation of fish and wildlife resources, but neither plan of development would supply water for irrigation of lands. We have indicated the extent to which these public purposes would be served under either plan. However, under existing law, these public purposes will be realized without expense to the United States to the extent that the projects are constructed by a non-Federal entity.

Development by Applicant of the Hells Canyon reach of the Snake River would provide 1,000,000 acre-feet of flood-control storage and the required stream flow regulation in aid of navigation on the lower river at no cost to the United States, would permit a reasonably prompt development of a water-power resource now going to waste, would assist in providing sooner a source of power supply for development of phosphate resources for use in fertilizer production, and would make possible the serving of electric consumers in the service area of Applicant with the lowest cost power supply that it could develop.

The existence of Section 7 (b) in the Act means that the Commission is given direct responsibility, in examining the plans of the Applicant and of others, to ascertain initially and independently whether development of those particular water resources should be undertaken by the United States. Congress has nowhere intimated that the adoption of plans by any Federal department shall automatically preclude development of those water resources by any non-Federal entity, if in the judgment of the Commission a license may be properly issued.

The fact that in Section 7 (b) Congress allows the Commission either to set the particular water resources aside for Federal development or to grant a license for development by a non-Federal entity is in itself an affirmative recognition by Congress that it is not in the public interest for the United States to undertake every water-power development that can be made or to reserve such water-power resources exclusively for Federal development merely because they happen to be subject to Federal jurisdiction or even because they happen to be included in a Federal agency's plans for Federal development. Even where there is a determination by the Commission that Federal development is desirable, Congress did not provide for indefinite postponement of construction, for it stipulated in Section 4 (e) only a two-year limitation on

further Commission action after a report to Congress, and Section 7 (b) does not contain any limitation. The Section 4 (e) stipulation just mentioned and the time limitations in Section 13, prohibiting delays by licensees in constructing projects, and other provisions of the Act indicate a Congressional intent that waterpower resources be utilized in the best possible manner and at the earliest possible time.

For the reasons heretofore stated, it is our judgment that the United States itself should not undertake the development of the water resources of the Hells Canyon reach of the Snake River for public purposes.

Most of what we have already said indicates that the Applicant's three-dam proposal is best adapted to a comprehensive plan of development as required by Section 10 (a) of the Federal Power Act but we will now consider whether Applicant has met the standards imposed by the Act for issuance of a license.

The Applicant has shown that its plan has engineering feasibility and will economically develop the head and stream flow of the Hells Canyon reach of the Snake River. Also, there is sufficient evidence to show that safe and adequate structures of the type proposed by Applicant can be constructed at the Brownlee, Oxbow and low Hells Canyon sites.

The three developments as proposed by Applicant would be relatively high load factor plants initially and their outputs would be at about the load factor of the Idaho Power Company system. Obviously, one market for the output of these three developments would be that system. Other potential markets for the output from the three developments would be neighboring electric systems which are members of the Northwest Power Pool. The extent to which power could be sold to other electric systems by Applicant during the time interval required to absorb the output of the three developments in the Applicant's

own system would depend, in part, upon the price for such power.

The record includes power requirement and power supply estimates for the Idaho Power Company system up to and including the year 1975, such estimates having been made by the Applicant and the Commission staff. These estimates show that the output of the Brownlee development would be needed by the time it could be completed, and that an additional supply from Oxbow would be needed by 1962. These estimates also show that the output of the three developments would be fully utilized in the Applicant's own system by about the year 1975.

In addition, the record indicates that there is a good possibility that power provided by the three developments and not needed by the Applicant in its system between now and 1975 can be disposed of to Utah Power and Light Company, a predominantly steam-electric system, and possibly to other utilities. Whether or not the Applicant does dispose of power to other systems should not affect our decision to issue a license for the three developments. As a practical matter Brownlee and Oxbow are definitely needed within the near future to supply Applicant's own needs, and if a sufficient load does not develop to justify construction of low Hells Canyon within the time limits imposed in the license, the Commission may either extend the time for construction or terminate the license for that project whichever is in the public interest at the time the matter is under consideration.

Some question has been raised as to our authority to include all three developments in a single license containing a condition permitting construction to be commenced on the Brownlee, Oxbow and low Hells Canyon developments within one, four, and six-year intervals respectively. It is our opinion that Section 13[4] permits such a construc-

[4] *Section 13.* That the licensee shall commence the construction of the project works within the time fixed in the license, which

tion schedule. With respect to commencement of construction, that section requires only that construction of "project work" be commenced within a maximum period of four years. The construction schedule to be followed thereafter with respect to other project works to be constructed subsequent to the four-year period is within the discretion of the Commission. This interpretation is in accord with the provisions of that section and the past practice of the Commission extending over a period of more than thirty years.

The record relating to the estimated cost of construction of the developments by Applicant and the value of power to be produced, based upon the cost of equivalent power from a modern steam-electric generating plant to be located in Applicant's service area, shows that the

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shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon the written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

estimated annual at-market cost of the power output that could be produced by the proposed developments is $27,921,000, inclusive of the annual cost of fish facilities, and that the estimated annual value of the power output at market that could be produced by the proposed project is $36,066,000. A comparison of the estimated annual cost and annual value convinces us that the proposed developments are economically feasible.

In reaching this conclusion we have accepted the staff's estimate of the capital cost of the proposed project as well as the staff estimates of the cost of power from the alternative steam-electric sources, which cost we consider to be equal to the value to the Applicant of power from the proposed developments. However, Applicant has presented estimates of capital cost which are about 28% lower than the staff estimates. If the Applicant can, as it claims, construct the project at a cost less than that estimated by the staff, then, of course, the economic feasibility of the project would be greater than we have indicated.

Applicant has shown that it could finance the construction of the project and the associated transmission, substation and distribution facilities even if the capital cost of the project should be as great as the cost estimate of the staff.

There remain two matters which require action on our part at this time.

On January 6, 1955, we deferred action until such time as the record is certified to the Commission for final action in these proceedings upon a joint motion filed December 23, 1954, by Lewis County Public Utility District, et al., and other associated interveners to dismiss the applications for licenses involved in these proceedings and to dispense with further briefs.

We have reconsidered the Interveners' motion to dismiss in the light of the record, the Presiding Examiner's

decision, the exceptions thereto and the oral argument thereon, and we find that the motion fails to show good cause for granting it.

On the contrary, these applications were processed in accordance with usual Commission procedures and when the Applicant has made any change or addition to its original proposals, amendatory or supplementary applications have been filed with the Commission. After a hearing extending over the better part of a year during which Interveners had every opportunity to present evidence, to fully cross-examine all witnesses, to file briefs and exceptions, and to be heard orally before the Commission, we see no possible manner in which a denial of the motion would deprive Interveners of any rights to which they are entitled under law.

In addition, we find that it is appropriate and necessary in order to carry out the provisions of the Act that we deny the motion and it is denied in its entirety.

On July 2, 1954, we similarly deferred action on the motion filed June 10, 1954, by Lewis County Public Utility District, et al., and National Hells Canyon Association, Inc., Interveners, appealing the Presiding Examiner's ruling striking the testimony of Leland Olds. The motion requests that the testimony in question be reinstated and that Mr. Olds be recalled for cross-examination. With respect to the latter request we note that the Applicant and the staff in their respective answers to the motion stated that they did not desire to cross-examine the witness in the event he were recalled. Therefore, the request that Mr. Olds be recalled for cross-examination is denied.

We have considered Mr. Olds' testimony in reaching our decision. We do not believe this testimony to be particularly informative, nor, on the other hand, that it would be prejudicial to the rights of the Applicant to have it reinstated. Therefore, it is reinstated.

For the reasons stated herein and in our findings and conclusions in the attached order we are issuing a license for the Brownlee, Oxbow and low Hells Canyon developments.

By the Commission.

LEON M. FUQUAY,
Secretary

Adopted: July 27, 1955
Issued: August 4, 1955

[R. 2844-2858]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby, Frederick Stueck and William R. Connole.

Projects Nos. 1971, 2132 and 2133

In the Matters of
IDAHO POWER COMPANY

Order Issuing License (Major)

Application was filed December 15, 1950, by Idaho Power Company, of Boise, Idaho, for a license under the Federal Power Act for a proposed hydroelectric development, known as Oxbow, and designated as Project No. 1971, to be located on Snake River in Idaho and Oregon, and on May 15, 1953, the Company filed applications for licenses for two additional proposed hydroelectric developments on Snake River, known as low Hells Canyon and Brownlee, and designated Projects Nos. 2132 and 2133, respectively. The proposed developments would be located in Adams and Washington Counties, Idaho, and in Wallowa, Baker and Malheur Counties, Oregon. The applications were supplemented by later filings.

Public hearings were held on the Oxbow application (No. 1971) during July 1952, in Baker, Oregon, and Boise, Idaho, respectively, at which all persons desiring to speak either in favor of or against the issuance of a license were heard. After the filing of the applications for low Hells Canyon (No. 2132) and Brownlee (No. 2133), the proceedings upon the three applications were consolidated for purposes of public hearing. A further public hearing was held in Washington, D. C., commencing on July 7, 1953, in which hearing all parties, including the Applicant, the staff of the Commission, as well as the National Hells

Canyon Association, Inc., Lewis County Public Utility District of Washington, et al., National Rural Electric Cooperative Association, the State of Washington and other parties participated, and presented testimony and documentary exhibits. After the close of the hearing, briefs were filed by the various parties and by the staff and an initial decision was rendered by the Presiding Examiner containing findings and conclusions. On July 6, 1955, the Commission heard oral argument on the exceptions to the Examiner's decision.

For the reasons set forth in Opinion No. 283 adopted this date and made a part hereof by reference, and upon consideration of the entire record in these matters, including the reports of the Federal and State agencies, protests from interested citizens, the briefs of the parties and the staff filed in connection therewith, the Examiner's decision, and the oral argument thereon, the Commission *finds:*

(1) The Brownlee, Oxbow and low Hells Canyon developments proposed by Applicant in the Hells Canyon reach of Snake River would occupy lands of the United States.

(2) The Snake River from its junction with the Columbia River up to the mouth of Henrys Fork is a navigable water of the United States.

(3) The proposed Brownlee, Oxbow and low Hells Canyon developments that would be constructed by Applicant would be located in and along a navigable water of the United States; and they would otherwise affect the interests of interstate or foreign commerce by affecting the downstream navigable capacity of the river.

(4) Under the provisions of Section 23(b) of the Federal Power Act, the Applicant may not construct, operate or maintain any project or part thereof in Hells Canyon reach of Snake River until a license shall have been obtained therefor pursuant to this Act.

(5) The proposed project consists of:

(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the applicant or by the United States; the general location of such project area being shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit "J"

FPC No.	Showing
1971-2	General Map of Oxbow Development
2132-1	General Map of Hells Canyon Development
2133-1	General Map of Brownlee Development

(b) All project works consisting of—

(1) The proposed Brownlee development, to consist of a rockfill dam having a maximum height of 395 feet and a crest length of 1320 feet at elevation 2090 feet in the Snake River at river mile 284.6, and a concrete spillway section surmounted by tainter gates, creating a reservoir with a usable storage capacity of 1,000,000 acre-feet at a drawdown of 101 feet below elevation 2077 feet; a controlled intake, power tunnel and penstocks leading to a powerhouse containing initially four turbines each rated at 139,000 horsepower and connected to a 90,100 kilowatt generator operating under a gross static head of 227 feet, with provision for an additional intake and tunnel and the future installation of two similar units in an extension to the power house; and transmission facilities;

(2) The proposed Oxbow development, to consist of a rockfill dam having a maximum height of 205 feet and a credit length of 725 feet at elevation 1810 feet in the Snake River at river mile 273.2 and a concrete spillway section surmounted by tainter gates, creating a reservoir with a usable storage capacity of 6,200 acre-feet at a drawdown of 5 feet below elevation 1800 feet; a canal, tunnel and penstocks across the Oxbow; a powerhouse containing initially four turbines each rated at 58,000 horsepower and connected to a 37,750 kilowatt generator operating under a gross static head of 117 feet, with provision for an additional tunnel and the future installation of two similar units in an extension to the powerhouse; and transmission facilities; and

(3) The proposed low Hells Canyon development, to consist of a rockfill dam having a maximum height of 320 feet and a crest length of 860 feet at elevation 1696 feet in the Snake River at river mile 247.5 and a concrete spillway section surmounted by tainter gates, creating a reservoir with a usable storage capacity of 11,200 acre-feet at a drawdown of 5 feet below elevation 1683 feet; an intake and power tunnel and penstocks leading to a powerhouse; a powerhouse containing initially five turbines each rated at 84,000 horsepower and connected to a 54,400 kilowatt generator operating under a gross static head of 208 feet, with provision for an additional tunnel and intake and the future installation of two turbines each rated at 105,000 horsepower and connected to a 68,000 kilowatt generator in an extension to the powerhouse; and transmission facilities; the location, nature, and character of which are more specifically shown and described by the exhibits heretofore cited and by other exhibits which also formed

part of the application for license and which are designated and described as follows:

Exhibit M

General Description and Specifications of Equipment.

Brownlee Development—Statement in one sheet received in the office of the Commission on May 15, 1953.

Oxbow Development—Statement in two sheets received in the office of the Commission on July 22, 1953.

Low Hells Canyon Development—Statement in one sheet received in the office of the Commission in May 15, 1953.

(c) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(6) Two alternative, mutually exclusive, plans of development have been proposed for development of Hells Canyon reach of Snake River and have been designated for purposes of identification as the one-dam and three-dam plans, the latter plan being proposed by Applicant.

(7) The one-dam plan would include the high Hells Canyon Project to be located 247.3 miles above the mouth of Snake River and having: a concrete arch dam to develop a 602-foot head, eight 100,000-kilowatt generating units initially with provision for one additional 100,000-kilowatt generating unit, a total

storage capacity of 4,400,000 acre-feet of which 3,880,000 acre-feet would be active storage, a spillway with a capacity of 300,000 cubic feet per second, and an operating head at the power plant varying from a maximum head of 602 feet to a design head of 475 feet and thence to a minimum head of 313 feet.

(8) The one-dam plan with an initial power installation of 800,000 kilowatts at the high Hells Canyon Project, or the three-dam plan with an initial installation of 783,400 kilowatts, would develop economically the 602-foot head in Hells Canyon reach of Snake River, could utilize the stream flow of the Snake River economically, and would have engineering feasibility.

(9) Projects with safe and adequate structures can be constructed in the Hells Canyon reach of Snake River regardless of whether they be in the one-dam or three-dam plans of development.

(10) Either plan of development hereinbefore described would provide flood control, navigation and recreational benefits in different degrees but would adversely affect fish and wildlife resources.

(11) The one-dam plan of development would provide the 2,300,000 acre-feet of flood control storage the Army contemplates in the main plan whereas the three-dam plan would provide at least 1,000,000 acre-feet of flood control storage and the difference would have to be provided somewhere else. The Department of the Army has not objected to the Applicant's proposal to provide 1,000,000 acre-feet of flood control storage in lieu of the 2,300,000 acre-feet contemplated under the one-dam plan.

(12) The one-dam plan of development would provide, more navigation benefits than the three-dam plan provide but for either plan such benefits are not substantial dollar-wise when compared to power benefits.

(13) The Chief of Engineers, Department of the Army, has reported that structures which may affect the interests of navigation are satisfactory.

(14) There is a qualitative indication in the record that the one-dam plan would provide somewhat larger

recreational benefits than would the three-dam plan, but sufficient comparative data are not available.

(15) None of the developments in either plan of development of Hells Canyon reach of Snake River would directly supply water for irrigation of lands.

(16) Either plan of development of the Hells Canyon reach would result in loss of, and damage to, wildlife resources but such losses could be mitigated in part if lands adjacent to proposed reservoirs were made available for wildlife development purposes.

(17) Either plan of development of the Hells Canyon reach of Snake River would block the runs of anadromous fish and some type of fish facilities would have to be provided for the protection of this resource.

(18) Assuming financing, construction and operation of both plans by the same entity, the ratio of power benefits to power costs of the three-dam plan is greater than that for the one-dam plan, and although the high Hells Canyon Project would produce a greater amount of power than the three-dam plan, the additional amount of power that could be produced by the high Hells Canyon Project would have a benefit-cost ratio of about one to one. Consequently the power features of the one-dam plan have no clear economic advantage over those of the three-dam plan.

(19) Federal construction of either plan of development proposed for the Hells Canyon reach could provide power revenues to subsidize irrigation works if such use is authorized by Congress.

(20) Federal construction of either plan of development proposed for the Hells Canyon reach could make possible a more extensive development of the phosphate resource located on land of the United States in Idaho and Utah than exists today.

(21) Public purposes such as flood control, navigation, recreation, and power production could be effectuated to about the same extent with private construction, as with Federal construction, of the same developments in the Hells Canyon reach of Snake River.

(22) There is a substantial power market in the area that could be served by projects in either plan considered for development of the Hells Canyon reach of Snake River.

(23) The extent to which electro-metallurgical use would be made of electric power that would be produced by development of the Hells Canyon reach would depend, in part, on the cost of such power.

(24) The general public has indicated an active interest in the plans proposed for development of the Hells Canyon reach of Snake River, and many individuals and spokesmen for groups have testified and submitted written comments thereon.

(25) The Brownlee, Oxbow and low Hells Canyon developments proposed by Applicant would utilize the head and stream flow in an economical manner.

(26) Safe and adequate structures of the type proposed by Applicant can be constructed in the Hells Canyon reach of the Snake River.

(27) The proposed developments could and would be operated to provide flood control storage and navigation benefits.

(28) Recreational facilities and opportunities would be provided by Applicant at the Brownlee, Oxbow and low Hells Canyon developments.

(29) The estimated cost of construction, exclusive of interest during construction, of the Brownlee, Oxbow and low Hells Canyon developments in the amount of $175,766,000 as estimated by the Commission staff appears reasonable. However, the record indicates that the Applicant may be able to construct these developments at a lower cost.

(30) The peak load requirement of the Idaho Power Company system have been increasing at an average annual rate of about 24,600 kilowatts during the 10-year period 1943 through 1952.

(31) The future peak load of Applicant's system is estimated to increase at an average annual rate of about 30,350 kilowatts.

(32) The total dependable capacity of 767,000 kilowatts that would be provided at the Brownlee, Oxbow and low Hells Canyon developments would be fully utilized in the Applicant's own system by about the year 1975 and in the Northwest area about as soon as it could be developed if indicated arrangements with other systems can be firmed up.

(33) The estimated annual at-market cost to the Applicant of the power output that could be produced by the proposed Brownlee, Oxbow and low Hells Canyon developments is $27,921,000 inclusive of annual cost of fish facilities.

(34) The estimated annual value to the Applicant of the power output at market that could be produced by the proposed Brownlee, Oxbow and low Hells Canyon developments is $36,066,000.

(35) The Brownlee, Oxbow and low Hells Canyon developments as proposed by Applicant would be economically feasible as power developments.

(36) The Applicant has shown ability to finance the proposed Brownlee, Oxbow and low Hells Canyon developments.

(37) Applicant has investigated power sites on Snake River above the Hells Canyon reach but indications are that such power output would be more expensive than the power output from developments proposed in the Hells Canyon reach.

(38) New steam-electric power stations as sources of power supply alternative to new hydroelectric developments would not be as economical.

(39) The Applicant should provide such fish protective facilities as may be required by the Commission upon the recommendations of the Federal and State fishery authorities.

(40) Applicant should provide means to preserve, to the extent practicable, the wildlife resources.

(41) The Applicant should provide means for conducting an archeological investigation in the Hells Canyon reach of the Snake River.

(42) The Applicant should coordinate the operation of its proposed Brownlee, Oxbow and low Hells Canyon developments and its power system with the Northwest Power Pool.

(43) The Idaho Power Company is a corporation organized under the laws of the State of Maine and is duly authorized to do business in the States of Idaho, Oregon and Nevada, and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for each of the developments, namely, Brownlee, Oxbow and low Hells Canyon.

(44) No conflicting application is before the Commission. Public notice has been given as required by the Act.

(45) The proposed developments will not use any Government navigation dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

(46) The issuance of a license for the proposed developments as hereafter provided will not interfere or be inconsistent with the purposes for which the Payette, Whitman, and Wallowa National Forests were created or acquired nor with the purposes of any withdrawal of public lands.

(47) The three proposed power developments should be considered as a single project.

(48) The proposed project is best adapted to a comprehensive plan for improving or developing a waterway for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreation purposes.

(49) The total installed horsepower capacity of the project hereinafter authorizes for the purpose of computing the capacity component of the administrative annual charge is 1,208,000 horsepower.

(50) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act, is reasonable as hereinafter fixed and specified.

(51) In accordance with Section 10(d) of the Act, the rate of return upon the net investment in the proposed project, and the proportion of surplus earnings to be paid into and held in amortization reserves, are reasonable as hereinafter specified.

(52) Inasmuch as the record shows a need for revision of same, the Applicant should be required to file revised Exhibits F, K, and L as hereinafter provided.

(53) The amount of reasonable annual charges for the use, occupancy, and enjoyment of lands of the United States to be occupied by the proposed project, including transmission line right-of-way, shall be hereafter fixed and specified by the Commission.

(54) The following described Exhibit J drawings and Exhibit M, filed as parts of the applications for licenses for Projects Nos. 1971, 2132 and 2133, conform to the Commission's rules and regulations and should be approved as part of the license for the project:

Exhibit J:

(FPC No. 1971-2), Oxbow H. E. Development, General Map;
(FPC No. 2132-2), Hells Canyon H. E. Development General Map;
(FPC No. 2133-1), Brownlee H. E. Development, General Map.

Exhibit M:

General description and specifications of equipment for Projects Nos. 1971, 2132 and 2133 (three exhibits).

(55) It is desirable to reserve for future Commission determination the question of what transmission lines and appurtenant facilities, if any, shall be included in this license.

The Commission *orders:*

(A) This license is issued to Idaho Power Company under Section 4(e) of the Federal Power Act for a period of fifty (50) years, effective as of the first day of the month in which the acknowledgment of acceptance hereof is filed with the Commission, for the construction, operation, and maintenance of the proposed Brownlee, Oxbow and low Hells Canyon developments (which developments for the purposes of this license, shall be considered as units of one complete project designated in the records of the Commission as Project No. 1971), subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license is also subject to the terms and conditions set forth in Form L-6, December 15, 1953, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The Licensee shall construct the project works as follows:

(a) Commence construction of the Brownlee unit within one year of the effective date of this license, and shall thereafter in good faith and with due diligence prosecute such construction; and shall complete that unit in 36 months.

(b) Commence construction of the Oxbow unit within four years of the effective date of this license, and shall thereafter in good faith and with due diligence prosecute such construction; and shall complete that unit in 24 months.

(c) Commence construction of the low Hells Canyon unit within six years of the effective date of this license, and shall thereafter in good faith and with due diligence prosecute such construction; and shall complete that unit in 36 months.

Article 29. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L, and Licensee shall not begin construction of the project works in any unit until the Commission approves the exhibits relating to that unit.

Article 30. The final design of the spillways at the dams of the proposed project shall be based on model tests.

Article 31. The Licensee shall, within one year from the date of commencement of construction of each unit, file with the Commission Exhibits F and K in accordance with the rules and regulations of the Commission.

Article 32. The Licensee shall prior to flooding clear lands in the bottoms and margin of the reservoirs up to high water level, and shall dispose of all temporary structures, unused timber brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintance of the projects works. In addition, all trees along the margin of the reservoirs which may die during the operation of the project shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 33. The Licensee shall cooperate with the Smithsonian Institution in the salvage of archeological values at four sites recommended by that Institution in a report dated January 1951 (Exhibit 10), and the Licensee shall, upon request of the Institution and further order of the Commission, contribute to that Institution the sum of $12,000 for archeological excavations.

Article 34. The Licensee shall make available to the Secretary of the Interior, upon his request and further order of the Commission, a sum up to $250,000 for use by the Fish and Wildlife Service to carry out detailed studies of the extent and character of the fishery resource of the project areas and to devise means and measures for mitigating losses to that resource.

Article 35. The Licensee shall construct, maintain and operate or shall arrange for the construction, maintenance and operation of such fish ladders, fish traps or other fish handling facilities or fish protective devices and provide fish hatchery facilities for the purpose of conserving the fishery resources and comply with such reasonable modifications of the project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon its own motion or upon the recommendations of the Secretary of the Interior and the conservation agencies of the States of Idaho and Oregon.

Article 36. The Licensee shall negotiate with the Fish and Game Commission of the State of Oregon and Department of Fish and Game of the State of Idaho with respect to the amount the Licensee shall pay each year to defray a reasonable portion of the operation and maintenance cost of fishery facilities to be provided under the license. Should the Licensee and the State agencies fail to agree on the amount to be paid by the Licensee for such purpose, the Commission reserves the right to determine the amount of this annual payment after notice and opportunity for hearing.

Article 37. The Licensee shall negotiate with the Game Commission of the State of Oregon and the Department of Fish and Game of the State of Idaho with respect to the acquisition by the Licensee for the State agencies of island and marsh areas along the Snake River for development as substitutes for waterfowl nesting areas

to be lost by reservoir inundation. Should the Licensee and the State agencies fail to agree on the acquisition of such lands, the Commission reserves the right to make a final determination in this matter after notice and opportunity for hearing.

Article 38. The Licensee shall make available to the Secretary of the Interior, upon his request and further order of the Commission, a sum up to $60,000 for the preparation by the National Park Service in cooperation with Licensee, of a recreational master plan.

Article 39. The Licensee shall operate the project and its system in coordination with the Northwest Power Pool, and shall arrange for such transmission facilities as may be required for such operation.

Article 40. At such time as the Commission may direct and to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing, the Licensee shall install additional generating units at the Brownlee, Oxbow, and/or low Hells Canyon units.

Article 41. The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead.

Article 42. In the interest of flood control the Licensee shall operate the project as follows:

(a) The total live storage space of about 1,000,000 acre-feet between elevation 1976 and elevation 2077 mean sea level will be made available for flood control use if and as required.

(b) The reservoir level elevation will be no higher than elevation 2034 by 1 March of each year to provide about 500,000 acre-feet of storage space for flood control use at that time each year.

(c) Additional storage space required up to 500,000 acre-feet will be obtained by evacuation as necessary during the month of March in a manner to insure availability on or before 1 April of the total storage capacity needed for flood control, as estimated by the Corps of Engineers. This space will be retained until capture of flood flows is requested by the Corps of Engineers, subject to possible involuntary storage as may be required due to temporary inflows in excess of outlet capacity, or until refilling in the interest of power output is authorized by the Corps of Engineers. In the event of involuntary storage, full capacity will be regained as soon as possible.

(d) During the flood storage period controlled outflows will be as requested by the Corps of Engineers. Daily outflows of 30,000 acre-feet, as a minimum, will be permitted when required for power purposes.

(e) In order to achieve the above operation for flood control, discharge capacity of 65,000 c.f.s. at minimum pool, evaluation 1976, including gated outlet capacity plus one-half of the ultimate turbine capacity, is to be provided by the Licensee.

(f) The above conditions will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

Article 43. The project shall be operated in the interest of navigation to maintain 13,000 c.f.s. flow in the Snake River at Lime Point (river mile 172) a minimum of 95% of the time, when determined by the Chief of Engineers to be

necessary for navigation. Regulated flows of less than 13,000 c.f.s. will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 c.f.s. at Johnson's Bar, at which point the maximum variation in river stage will not exceed one foot per hour. These conditions will be subject to review from time to time as requested by either party.

Article 44. The Licensee shall pay the United States the following annual charges for the purpose of reimbursing it for the costs of administration of Part I of the Act: One (1) cent per horsepower on the authorized installed capacity (1,208,000 horsepower) plus two and one-half (2½) cents per 1000 kilowatt-hours of gross energy generated by the project during the calendar year for which charge is made. The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.

Article 45. The Commission expressly reserves the right to determine at a later date the question of what transmission lines and appurtenant facilities, if any, shall be covered in this license and included as part of the project works.

(C) The exhibits described in finding (54) above are approved as part of the license for the project.

(D) This order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided by Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgement of the acceptance of this license, it

shall be signed for the Licensee and returned to the Commission within sixty (60) days from the date of issuance of this order.

By the Commission.

LEON M. FUQUAY,
Secretary

Adopted: July 27, 1955
Issued: August 4, 1955

IN TESTIMONY OF ACCEPTANCE of all the provisions, terms, and conditions of this license, Idaho Power Company this day of , 19 , has caused its corporate name to be signed hereto by , its President, and its corporate seal to be affixed hereto and attested by , its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the day of , 19 , a certified copy of the record of which is attached hereto.

IDAHO POWER COMPANY

By

President

Attest:

Secretary

(Executed in quadruplicate)

[R. 2928-2929]

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck and William R. Connole.

Project No. 1971

In the Matter of
IDAHO POWER COMPANY

Order Approving Revised Exhibits

A letter was received August 11, 1955, from Idaho Power Company, licensee for major Project No. 1971, authorizing the Commission staff to revise Exhibit J (FPC No. 2133-1), now part of the license for the project, to show the correct acreage and description of lands in Oregon within the project area.

Pursuant to Article 29 of the license for the project, Idaho Power Company on September 12, 1955, filed for Commission approval the following revised Exhibit L drawings showing general design details of principal structures and appurtenant project works for the Oxbow and Brownlee developments:

Exhibit L:
(Revised)

FPC No.	Drawing No.	Title
1971-41	F-140647	Brownlee H.E. Development—General Plan
1971-42	F-140648	" " " " —Penstock Section Diversion Section
1971-43	F-140649	" " " " —Dam & Spillway Sections
1971-44	F-140650	" " " " —Power House Plans and Section
1971-20	F-140697	Oxbow H.E. Development—Dam and Spillway Plan and Sections
1971-21	F-140698	" " " " —Intake and Powerhouse Plan and Sections
1971-22	F-140699	" " " " —Power House Plans and Section

Exhibit J has been revised as requested and the Secretary of the Army and the Chief of Engineers have approved the plans of the project structures—the above-described revised Exhibit L drawings—in accordance with Section 4(e) of the Federal Power Act.

The Commission *finds:*

Exhibit J (FPC No. 2133-1), as revised, and superseding Exhibit J (FPC No. 2133-1), now part of the license for the project, and the above-described revised Exhibit L drawings (FPC Nos. 1971-41 through -44 and 1971-20 through -22) conform to the Commission's rules and regulations and should be approved as part of the license for the project and said superseded exhibit should be eliminated from the license.

The Commission *orders:*

(A) Exhibit J (FPC No. 2133-1), as revised, and the above-described revised Exhibit L drawings (FPC Nos. 1971-41 through -44 and 1971-20 through -22) are approved as part of the license for the project and superseded Exhibit J (FPC No. 2133-1), now part of the license for the project, is eliminated from the license for the project.

(B) This order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order.

By the Commission.

J. H. GUTRIDE,
Acting Secretary.

Adopted: November 2, 1955
Issued: November 3, 1955

[R. 2417-2503]

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Decision

Project No. 1971, No. 2132, and No. 2133

In the matters of Idaho Power Company

UPON APPLICATIONS FOR LICENSE UNDER
THE FEDERAL POWER ACT

Appearances

For the Applicant, Idaho Power Company
A. C. INMAN, Boise, Idaho
R. P. PARRY, Twin Falls, Idaho

For the Interveners, National Hells Canyon Association and Lewis County, P.U.D., et al.
EVELYN N. COOPER, Washington, D. C.
LUCIEN HILMER, Washington, D. C.

For the Staff of the Federal Power Commission
JOHN C. MASON, Washington, D. C.

(Appearances are continued in Appendix III, *infra*)

COSTELLO, *Presiding Examiner:* This is a hearing officer's initial decision covering a proceeding which began with the filing of an application under the Federal Power Act in December 1950. Under the Rules of the Commission, the initial decision (also termed a "Report") which contains findings, conclusions, and an order has only such force and effect in whole or in part as the Commission may ordain. There are but few ascertainable facts involved which have been the subject of dispute.

The real controversies arise from the selection of which facts should prevail, which predictions and estimates are most reliable, and which course of action under the basic statute will serve best to promote the public welfare.

The record for decision in this matter consists of nearly four hundred documents, such as maps, tabulations letters, reports, graphs, and photographs, together with nearly twenty thousand pages of verbatim stenographic notes of the public hearing which were accumulated during approximately one hundred fifty hearing days. In addition to this mass of data, there were frequent references made by all concerned to vast published reports by the Corps of Engineers of the Department of the Army, and extensive published reports by the Bureau of Reclamation of the Department of the Interior, as well as a published hearing of a Congressional subcommittee nearly a thousand pages long.

Each of the active parties in this proceeding, and the Staff of the Commission have filed briefs, the majority of which exceed two hundred pages and in the aggregate approximately a thousand pages of reading matter.

It is from this unwieldy and formidable record that the Examiner's Report, and eventually, the Commission's final decision must be derived.

Some of the difficulty in dealing with the record in this proceeding has arisen from the need to employ many different assumptions on many different subjects to reach usable results, since, of course, most of the key factors are securely locked behind the doors of Time. Engineers know with certitude that the dropping of X amount of water from Y height through a penstock and turbine to which is attached an electromagnetic machine will transform the kinetic energy of the water into Z amount of electric energy. Engineers know that if a dam is constructed to X height with Y units of material at so many

dollars per unit, that the dam will cost Z amount of dollars. By dividing the annual cost of the development by the power produced, a unit cost of electric energy is derived. There is nothing mysterious about this, and even non-engineer has no difficulty in absorbing it. The complications arise, however, when variations are introduced in the basic problem. Then assumptions are made as to the type of dam to be constructed, one dam vs. two dams, one dam vs. three dams, etc. Assumptions are made for periods of construction, one dam with or without an accelerated construction program vs. three dams with or without an accelerated construction program. One dam with Federal financing vs. three dams with private financing, or both proposals with Federal financing. One integrated with the Federal system plus various additions vs. three dams interconnected with the Federal system plus various additions. The combinations of assumptions in this record are almost endless, and, some it might be argued, almost valueless. Most of the elaborate analyses in the record are based upon pure guesswork—by experts who have utilized all of the skills and science availabe to the human mind—but nevertheless, still pure guesswork. The able engineers who have come up with widely divergent results in the various phases of this problem have done so because they have used different basic assumptions, because utilizing the same assumptions all engineers must necessarily reach the same results. The choice of assumptions which should govern the analyses and, thus the results, is an arbitrary one, and is based largely upon viewpoint.

The parties hereto have made what must be deemed a sincere effort to chart a course through this pathless sea of assumptions and results as reflected in the testimony of the various expert witnesses.

This explanatory statement is made to explain why an approach taken in this Report is markedly distinguishable

from the approaches used in the Interveners"[1] and, particularly, the Staff's briefs. Briefly restated, it is the conclusion of the undersigned that the applications filed herein must be studied, evaluated, and passed upon on their own merits and that comparisons with other ideas, proposals, and concepts must be kept, as nearly as possible, to an irreducible minimum in order that some semblance of logic and order may be maintained. First, therefore, the applications will be discussed, and findings and conclusions thereon will be stated. Secondly, other proposals will be discussed and findings and conclusions will be stated thereon in connection with Section 7(b) of the Act.

Statement of the Proceeding

Idaho Power Company, an investor-owned Maine corporation, engaged in the sale and distribution of electric power in southern Idaho, seeks in this proceeding, a license or licenses under the Federal Power Act authorizing it to construct, operate, and maintain certain project works in the Snake River for the development and improvement of navigation and for the development, transmission and utilization of power. The Snake River is a stream over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states. In addition, certain public lands of the United States would be occupied by the proposed hydroelectric project works.

The proposals of the company involve the construction of three dams, and all necessary appurtenant works. These dams are more fully described in a table, Table 1, appearing on page 12, *infra*.

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[1] As used in this Report "the Interveners" will refer to those two interveners permitted to intervene by the Commission's order issued July 9, 1953, namely, National Hells Canyon Association and Lewis County Public Utility District, et al., who were the only interveners who participated fully in this matter. When other interveners are referred to, they will be mentioned by name.

The hearing on the proposals of the Applicant began in 1952. The first sessions were non-technical and were held in Baker, Oregon and in Boise, Idaho, affording an opportunity to the general public living in the region to express their views. In 1953, the hearing was resumed in Washington, D. C. and continued with certain interruptions for approximately a year.

The Issues

The issues in this case are the usual issues in a license proceeding. In general, the statute (See Appendix I) provides a means whereby citizens, associations of citizens, and domestic corporations may apply for, and, if certain requirements are met, may obtain authority to utilize the nation's water resources for a period not exceeding fifty years, under a license which contains provisions and conditions designed to insure beneficial development of water resources. To protect the investors in such an undertaking, licenses may be revoked or cancelled only in accordance with law, and may be altered only upon mutual agreement between the licensee and the United States.

The United States has a right to take over, maintain, and operate any project upon the expiration of the license, although it could take over any licensed project at any time by condemnation proceedings upon the payment of just compensation.

Because the use of the nation's water resources is for a specified and limited period, and because there is a clear right reserved to the United States to "recapture" the power site and all of the project works, there is need for examination of each proposed development to ascertain whether or not it will fit into a durable scheme of development of the stream and the watershed. The statute prohibits the Commission from licensing any project which is not "best adapted to a comprehensive plan", but leaves

the matter of whether or not the plans presented are acceptable to the judgment[2] of the Commission.

It would seem that the statutory guides for issuance of licenses under the Federal Power Act are purposely loose-jointed in order that the Commission, a bi-partisan agency, appointed by the President with the advice and consent of the Senate, may act with relative freedom in deciding how and upon what terms citizens will be permitted to utilize the Nation's water resources.

It is around this statutory phrase "comprehensive plan" that the battle lines have formed in this proceeding. To the Applicant the phrase has certain meanings which are in complete conflict with the meanings attached to the phrase by the Interveners. The Staff of the Commission urges that certain meaning be given to the phrase, the hearing examiner has views on the meaning of the phrase, some of which will be reflected herein.

The other section of the Federal Power Act from which much of the disagreement of the participants in this matter has arisen is that statutory mechanism by which the Commission may recommend to Congress that a certain water resource development be undertaken by the United States itself (See Appendix I). Here, again, the section of the law comes into play only upon the reaching of a *judgment* by the Commission—a mental process which may be activated by innumerable factors. Here, again, the parties, the Staff, and the examiner may only express their own judgments of the matter—one of which or none of which may exactly coincide with the judgment of the Commission.

There are other sections of the Act which might have been the source of issues but which are not, as for example, the matter of the Applicant's compliance with the laws

[2] The mental act of judging; the operation of the mind, involving comparison and discrimination, by which knowledge of values and relations is mentally formulated.

of the States in which it proposes to operate the projects. Routine findings will be made on these and other matters which do not constitute sources of controversy.

Discussion of the Law

As has been pointed out, the statutory language governing this problem is loose and flexible, and necessarily so. And, while it may make the task of the lawyers in the matter extremely difficult, the licensing process does not adapt readily to formal and unchangeable pleadings, and formal adjudicatory processes. Congress, the source of authority, provided a means for the development of the nation's water resources by it citizens, which would supplant the former practice of obtaining special legislation on each individual proposal. The process by which the earliest dams were directly authorized by Congress was cumbersome and rather haphazard and it was decided by the lawmakers that the job of screening these proposals would be more efficiently performed by a separate agency. The development of the administrative process has proceeded rapidly in the last three decades due to the increasing complexity of all governmental processes. However, it would seem that the basic theory which must be kept in mind in dealing with these matters is that the Commission acts in the licensing process only as the agent of the Congress, and that just as the Congress has a wide latitude for discretion in the passage of laws, the Commission operates in a somewhat similar climate within the scope of the authority granted. The invariable refusal of reviewing courts to substitute their judgment for that of an administrative agency so long as there is in the record substantial evidence which will support the agency's action, and in the absence of showing of arbitrary or capricious treatment, is in accordance with the will of Congress expressed in the statute. (Section 313(b))

The Commission, then, may within rather wide limits determine that a proposed project fits within the "com-

prehensive plan'' of waterway development, and is not restricted by law in the guides and measurements it believes in the public interest to be applicable in the process of reaching its decision. Each proposal may be examined without respect to determinations on other proposals and there is no requirement that each action be completely consistent with precedent, however desirable this might be.

There are no considerations which bind the Commission in determining whether or not a recommendation should be made to the Congress for Federal development of a water power site. It is a completely discretionary matter.

It has been the refusal of some of the opponents of the applications to recognize this rather wide discretionary aspect of this matter that has been responsible for some of the ingenious and time-consuming tactical maneuvers which have been brought into the case from time to time.

For the purposes of this initial decision, then, the following interpretation of the two sections of the Act heretofore discussed, will be employed.

The Federal Power Act was enacted by the Congress in 1920 for the purpose of providing a means by which private investors could undertake the development of electric energy from the nation's waterways under the terms and conditions of a license which would provide a protected investment for the period of the license and which would, in turn protect every interest of the public. At the time the original Act was passed, the huge water power potential of this continent was practically untapped, and labor disputes in the principal coal mining regions of the United States had resulted in the need to ration electricity at a time when the nation was engaged in a major war requiring great quantities of munitions and supplies.

There was no intent at the time of the passage of the original Act that the United States itself would ever be a

major developer of electric power or that the United States would assume the role that it has in some of the regions of the nation. There was no intent in the minds of the Congress at that time that electric power would some day be made an instrument of social reform. It was the intention of Congress that the Commission permit and promote development of the nation's waterways if the proposal by the applicant did not conflict with larger overall plans beyond the scope of the individual and actually result in permanent economic waste of great proportions. The role of the Commission under the law is that of guardian, coordinator and promoter. It was expected to refuse to permit harmful or short-sighted development, and under the law was authorized to require modification of project plans before approval, if such modification was necessary to prevent improper development. (Appendix I, Section 10(a)).

From the earliest times, the Commission has examined with great care the extent of the market for the electric energy sought to be produced, and has denied many applications for preliminary permits and licenses on the ground either that no market existed, or that the cost of the power would be in excess of that for steam electric energy.

In addition to the delegation of authority to grant licenses, to deny licenses, and to modify plans before granting licenses, the Congress legislatively required the Commission to call to the attention of Congress any instances where, in the Commission's judgment, there was some special reason why there should be development of the waterway by the United States rather than by an individual, or an association of individuals. While this was intended as a safeguard, it is believed that the primary purpose of this portion of the Act was to provide a mechanism whereby information might be forwarded to the Congress which would not be available to Congress from other sources. It is not believed that the Commission was expected to process every application for a hydroelectric

power project as though the United States was a rival applicant. Here, again, the matter of emphasis is important in the determination of this controversey. If this section of the Act is to be treated as a means of effectuating social advances via Federally-financed public works, and as a means of depressing the rates for electricity and electric service in areas where the local regulatory authorities are unable or are unwilling to do so, all studies of comparative proposals will necessarily be weighted in in favor of referring every proposal to the Congress under Section 7(b) so that the desired ends—improved standards of living, more production, more jobs, will be achieved thereby. On the other hand, if the Act is interpreted as it was intended to be, back in 1920, as a means by which Congress would be informed of needed public works of which it might not otherwise be aware, the scales used in weighing of the comparative proposals would be weighted in favor of encouraging private investors to develop these natural resources as the agent of the sovereign, and to resolve doubtful questions in favor of private investment.

When the Federal Water Power Act was enacted, it was administered by the heads of three major Departments of Government. In 1926, just a few years after the enactment of the Water Power Act, a pattern was established for intensive river system and river basin studies by the War Department, Corps of Engineers, in House Document No. 308. These river system studies—called "308 Reports" have provided the Congress with a vast storehouse of data far exceeding in scope any study that this Commission with its limited appropriations and limited personnel has undertaken or could undertake. In addition to these Army studies there have been extensive river basin studies by the Bureau of Reclamation, Department of the Interior, and some by the Department of Agriculture, through the years, most of which have been submitted to the Congress. While this Commission has under-

taken important river basin studies, its work has not been as wide in scope as those studies by the Departments.

It is probably because of this Commission's knowledge that Congress has been furnished this tremendous store of data by these Departments that Section 7(b) has died on the vine, so to speak, having been utilized by the Commission but one time in its more than three decades of service. Since the study and analysis functions of these Departments have all come into being since the Federal Water Power Act was enacted, Section 7(b) might be regarded as a sort of legislative anachronism which has been given exaggerated importance in this proceeding and which has served no purpose except to provide a port of entry into the Commission's licensing procedures by organizations which would be hard put to suggest any other basis for their participation.

Thus, it may be seen, the licensing provisions of the Federal Power Act may not be administered with a slide rule no matter how desirable this method might be. While there have been those who would limit the consideration of the problem to "facts" which of course, are very important, it is is quite obvious that the Congress in delegating its own power to permit occupancy and use of the navigable waters and public lands of the United States, intended that the Commission administer the rather broad provisions of the licensing law with a view to achieving the greatest good for the greatest number of humans for the longest period. No computer has been designed that will supply the judgment required to solve problems involving human factors.

OREGON
IDAHO

Part I

THE THREE DAM PLAN

The Applications

In passing upon applications under the Federal Power Act for authority to construct hydroelectric works in the navigable waters of the United States and utilizing public lands, it was the intention of Congress that the licensee proceed upon the basis of plans which could achieve the best over-all use of the watershed. The section of the Act says "best adapted to a comprehensive plan", and this phrase has been interpreted as requiring "full development" on one hand, or such development as would not be in conflict with any over-all plans which had been formulated. For the purposes of this report and for analysis, the latter meaning will be used. Under this approach to the matter, attention will be given to the regional planning which has been reflected in this record.

For those who deal with the problems of water-resources development in the Northwest, the report of the Corps of Engineers titled "Review Report on Columbia River and Tributaries" and issued October 1, 1948, published as House Document No. 531, 81st Congress, 2d Session, is an absolutely indispensable source of data and information. This authorative report was designed as a guide to proper development of the Columbia and its tributaries for flood control, navigation, power, irrigation, fish and wildlife, elimination of stream pollution, improvement of recreation, all to be accomplished with the "minimum interference with the existing regional economy, with fish and wildlife habitat, and with the main scenic and recreational areas of the basin".

The Snake River, which is involved here, is the largest tributary of the Columbia and contributes slightly more than one-fifth of the annual mean run-off of the Columbia River and drains 109,000 square miles.

The Corps of Engineers divided its study of the Snake River into portions dealing with the Upper Snake River Basin and the Middle and Lower Snake River Basin. It is with the Middle Snake that we are concerned here, for it is in that portion of the stream that the three Idaho Power Company dams would be located. An aerial photograph of Hells Canyon is reproduced here on page 75. Idaho Power Company's three proposed dams—or any development by Idaho Power Company for that matter—would eliminate a single dam of heroic proportions which would store approximately three times as much water as the development proposed by Idaho Power, and which was originally proposed by the Army as one of the key projects for flood control regulation in the Columbia Basin. The Army's High Dam Project would also produce large amounts of power, would improve navigation, and would have recreational aspects. It was devised as a completely integrated part of a master plan for the Columbia River.[3]

The High Dam Project has not been authorized, although there have been several attempts to bring this about, and there is legislation on the proposal even as this report is being prepared. The major part of the hearing on the applications of Idaho Power Company concerned the High Dam Project and the comparisons that its champions regard as a necessary aspect of this decision.

To even summarize the Army's plan and the Main Control Plan which comprises the most important part of it, would impose an intolerable burden on this report, and would tend to take us far afield. For the purposes of this report, at least, the Army's plan will be regarded as a

[3] In order to reduce the confusion which might come from a discussion of the Federal Hells Canyon Project and the Idaho Power Company's Hells Canyon Project, listed herein as Project No. 2132, I shall refer to the Federal project as the "High Dam Project". Both of the storage projects involved in this matter involve high dams, however. The High Dam Project, if built, would be the second highest dam in the world. Brownlee Dam, if built, would be among the fifteen highest dams in the United States.

proper comprehensive plan for the water resourses development of the Northwest, and, while variations and adjustments must be made in the plan from time to time, the basic framework of the plan should not be disturbed except for the most pressing reasons.

The initial consideration of Idaho Power Company's substitution for the Army's plan will be limited to the question of the effect of such substitution on navigation and flood control. Other aspects of the Army proposal and the economic and sociological aspects of the High Dam Project will be discussed in Part II, hereof.

The Three Dam Plan: Flood Control

The only storage development proposed by Idaho Power Company is the Brownlee Project which would provide approximately 1,000,000 acre-feet of active storage.

Whether or not the substitution of this smaller storage in lieu of the 3,280,000 acre-feet of storage proposed for the Middle Snake by the Army would jeopardize the comprehensive plan for the basin has engendered much study and analysis in this record.

The Main Control Plan would provide sufficient upstream storage to control the 1894 flood to 800,000 cubic feet per second at The Dalles. Below The Dalles protection to a flow of 800,000 cubic feet per second would be provided by levees. The reservoir projects included in the Main Control Plan (see Ex. 293) are as follows:

Project	Usable Flood Control Storage Acre-Feet	Storage Filled For 1894 Flood
Libby	4,250,000	3,900,000
Hungry Horse	2,980,000	2,100,000
Glacier View	3,160,000	1,800,000
Albeni Falls	(Local Flood Control Only)	—
Grand Coulee	5,120,000	5,120,000
Hells Canyon	3,280,000	2,600,000
Palisades	1,200,000	1,200,000
Anderson Branch, Arrowrock, Lucky Peak	1,000,000 in Boise Valley	230,000
Cascade, Garden Valley	1,900,000 in Payette Valley	460,000
Priest Rapids	2,100,000	2,100,000
John Day	2,000,000	1,400,000
Total	26,990,000	20,910,000

Subsequent to the completion of the report contained in House Document 531, new studies of the basin by the Corps of Engineers indicated that a number of satisfactory systems could be devised which would provide the flood control equivalent of that proposed in the Main Control Plan. These studies show that a reasonable distribution of the storage must be obtained to provide protection against major floods. G. H. Fernald, of the Corps of Engineers, testified that an alternative plan consisting of the following projects would prove to be adequate for the Main Control Plan purposes:

Project	Usable Flood Control Storage— Acre-feet
Libby	5,010,000
Grand Coulee	5,120,000
Hungry Horse	2,980,000
Palisades	1,200,000
Boise Valley	1,000,000
Cascade and Garden Valley	1,900,000
Priest Rapids	2,100,000
Brownlee	1,000,000
Bruces Eddy	1,433,000
Penny Cliffs	2,300,000
John Day	500,000
Total	24,543,000

On the subject of proposed substitution of the Brownlee Reservoir for the Hells Canyon reservoir, Fernald testified that the difference in effective storage would be 1,300,000 acre-feet rather than the 2,880,000 acre-feet sometimes attributed to the big dam. It is concluded therefore that the substitution of Brownlee for the High Dam would make it necessary to obtain 1,300,000 acre-feet of flood control storage elsewhere in the Snake River basin above the mouth of the Salmon River if the integrity of the Main Control Plan is to be maintained. There are other combinations of projects which would achieve the Main Control Plan goal and in the event such other storages are provided the deficiency would be substantially less than 1,300,000 acre-feet. In this connection it is observed that there are numerous sites in the Upper Snake River basin which might at some future date be developed. Construction of the proposed Bruces Eddy and Penny Cliffs projects on the Clearwater River, together with Pleasant Valley and Mountain Sheep projects on the main stem of the Snake River below the Hells Canyon site, would provide more flood control storage in the area than was anticipated at the big dam in the Middle Snake.

The record contains information as to the Army's valuation of the benefits of the various flood control reservoirs in the Main Control Plan, including the High Dam in the Middle Snake. The value, of the storage, in the Middle Snake River area to the lower Columbia River, for the purposes of economic evaluation, according to Witness Fernald, would be in the order of $1.00 per acre foot.

However, since comparisons of Brownlee storage vs. High Dam storage must be made on the basis of a theoretical weighing of the advantages of installation of two different sizes of storage by the same construction agency, and there is no suggestion in the record that any of the planning agencies of the Government have suggested that the smaller storage project at the Brownlee site be constructed with Federal funds, it seems particularly pointless to compare the two plans from this standpoint. Theo-

retically, when the Government builds a project that is designed to prevent or alleviate destructive floods, this insurance against downstream flood damage is given a dollar value, and the value is a factor in arriving at the cost of electric power, which in turn is taken into account in the development of a rate for the sale of the power. A private company which builds a power dam having flood control values must regard this improvement as non-revenue producing, and it cannot include such improvements, as such, in its rate base.

The economics of the High Dam—from the standpoint of the Government and under policies which govern the evaluation of these matters from a Government standpoint—definitely include flood control values. This will be discussed in Part II, *infra*.

The Three Dam Plan—Navigation

It is generally understood that Idaho Power Company, if permitted to construct the Brownlee development, will be required as a condition precedent to the issuance of a license, to provide a minimum release of water from its dam in order that a flow of 13,000 cubic feet per second will obtain in the downstream channel between Lime Point and Lewiston 95% of the time. All of the plans of the company have taken this requirement into consideration.

It is contemplated that the Snake River will be improved for navigation between Lime Point and Lewiston to provide a channel 6 feet deep by 150 feet wide and that commercial navigation will be established. If this channel improvement is made, the releases contemplated under the Brownlee plan of operation would provide the required minimum flow for 98.3 percent of the time.

There is some possibility of navigation on the 44-mile long Brownlee reservoir, especially since the drawdown in the average year should not exceed 60 feet and, according to Witness Fernald, navigation use could be coordinated

with the periods of drawdown. "With modern methods of handling by belt conveyor and mobile clam shell" according to Fernald "bulk commodities can be handled practically within a range of about 50 to 60 feet of fluctuation with suitable land side terminals. Topography adjacent to rail sites near Huntington is adaptable to dock facilities to operate over this range. Similarly, pool shorelines in the mineral area of the Seven Devils Mountains should accommodate loading of bulk ores onto barges over this same 50 to 60 foot range".

While the record contains some estimate of navigation benefits for the Brownlee Project, expressed in dollars, this estimate is of only academic interest since Idaho Power Company has no access to the figure for revenue purposes.

The Three Dam Plan—Irrigation

The three dam plan proposed by the Company has no relationship with irrigation except in the fact that some of the water to be utilized in the power facilities will be return flow water from irrigation projects upstream and the power output from the three projects would be available for sale for irrigation pumping use.[4]

An unconscionable amount of time was spent in the hearing of these applications examining the problem of the effect of upstream use of water for irrigation on the production of power in the middle section of the Snake. It is true, as the Idaho Power Company Opening Brief observes, that it is impossible to evaluate power production in the middle stretch of the Snake without a study of the irrigation development of the Snake River above it, and,

[4] There is some relationship in the fact that Section 17 of the Act provides that 50% of the charges arising from licenses for the use of public lands and national forests "shall be paid into, reserved, and appropriated as part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902."

TABLE 1

THREE DAM PLAN
PERTINENT DATA

	Brownlee	Oxbow	Hells Canyon
General			
Name			
F.P.C. Project Number	2133	1971	2132
River	Snake	Snake	Snake
Stream mile from mouth	284.6	273.2	247.5
Drainage area, square miles	Not available	Not available	74,000
Reservoir			
Maximum retained pool elevation, feet	2077	1800	1683
Minimum power pool elevation, feet	1976	1795	1678
Total storage capacity, acre-feet	1,500,000	Not available	Not available
Usable storage capacity, acre-feet	1,000,000	6,200	11,200
Dam			
Type	Rockfill with reinforced concrete upstream slab	Rockfill with reinforced concrete upstream slab	Rockfill with reinforced concrete upstream slab
Maximum height, feet	395	205	320
Elevation crest of dam, feet	2090	1810	1696
Crest length, feet	1320	725	860
Upstream and downstream slopes	1.4 to 1.0	1.4 to 1.0	1.4 to 1.0
Spillway			
Capacity at normal pond level, c.f.s.	310,000	250,000	250,000
Capacity with 5-foot surcharge, c.f.s.	350,000	300,000	300,000
Spillway gates, number and type	6-Tainter	8-Tainter	6-Tainter
Spillway gates, size in feet	40 x 39	36 x 39	40 x 40
Power Plant			
Initial installation, kilowatts	360,400	151,000	272,000
Ultimate installation, kilowatts	540,600	226,500	408,000
Maximum power head, feet	277	117	208
Minimum power head, feet	176	112	203

obviously, an unforeseen demand for water for irrigation could so affect the power of production of hydroelectric projects downstream as to disturb their economic feasibility.

While there was some expert testimony in the record which would cast doubt upon the dependability of water supply for the larger High Dam Project throughout its economic life, there was no evidence of any lack of water forecast or diminution of flow contemplated that would affect the economic feasibility of the Idaho Power Com-

pany proposal. The High Dam Project will be discussed in this respect in Part II hereof.

The Three Dam Plan—Recreation, Fish, and Wildlife

The three dam plan would affect the natural habitat of the fish and wildlife in the area, just as any major water power development might be expected to do. The two run-of-river plants would provide smallish ponds for recreational use, and the Brownlee storage project would seem to have major recreational advantages.

Any development of the middle stretch of the river would interfere seriously with the movement, breeding, and natural propagation of migratory game and food fishes. Under Section 19 of the Federal Power Act as amended, the Secretary of the Interior is authorized to prescribe such fishways as he deems desirable and necessary, and the Commission is under obligation of the statute to require the construction and operation of such fishways as may be so prescribed. There have been consistent efforts made by all concerned with the development of Western streams to provide adequate protection for fish and for wildlife, as well, although the latter has usually presented few problems.

The Staff of the Commission have recommended the imposition of special license conditions respecting the protection of fish and wildlife which are consistent with the statutory recommendations of the Secretary of the Interior and Idaho Power Company has indicated its general acceptance of such conditions.

No effort has been made to state the monetary relationship of the Applicant's proposed projects to recreation, fish and wildlife. Also it is apparent that the effect of the various annual payments for these things, would have little or no effect upon project economics.

The Three Dam Plan—Capital Costs

One of the subjects of the hearing upon which much time was spent is the matter of the capital and annual costs. The feasibility of the proposal by Idaho Power Company hinges to a great extent on the ability of their engineers to accurately forecast how much the power to be produced from these dams will cost.

It would be a space-consuming and rather useless endeavor to attempt to canvass this subject in anything approaching the detail contained in the testimony and exhibits of the various experts, or even in the detail set forth in the briefs in this matter—particularly the principal brief of the Staff. This may be said with no fear of contradiction—the cost aspect of this matter has been given the most thorough analysis possible with the facts on the subject available.

The real problem for the deciding authority here is selecting which expert has presented the most accurate estimate. Quite naturally, Idaho Power Company is inclined to rely upon its chief cost witness Mr. E. A. Woodhead, its chief construction engineer, who has actually built a number of power plants on the Snake River. As stated in the Idaho Power Company Brief, "Mr. Woodhead and his assistant carefully studied the design and layout of the projects and computed the volumes of materials to be moved and placed. The unit costs used were based upon his actual experience in similar construction, giving consideration to the manner in which the work will actually be dovetailed and accomplished." "Mr. Woodhead personally made the final determination of quantities and unit prices which he characterized as very conservative and wholly safe."

"However," as Idaho Power Company's Brief contihues, "in order to be doubly sure of the probable cost of the three projects, Idaho Power obtained independant estimates from Morrison-Knudsen Company Inc., one of the largest

contracting firms in the world, with international experience in the construction of dams and hydroelectric projects—they have been joint venture participants in numerous projects including Bonneville, Grand Coulee, Garrison, Ross, and Hungry Horse. Likewise they have had wide experience in Idaho, particularly on the Snake River, where they have built the Company's six most recently constructed projects."

Estimates by the contracting firm—known in the business as M-K were stated for the record by Mr. Bernard Williams, Vice President in charge of the Dams and Hydroelectric Division of M-K, who reviewed and studied the Woodhead quantities, unit prices, and costs, and made a most remarkable offer—in the early days of the hearing in 1953—and repeated it again in the closing days of the hearing in 1954. This offer was to the effect that his company would undertake the three dams proposed by Idaho Power Company either separately or collectively on the basis of the Company's estimates. Repeated efforts by counsel for the Staff and for the interveners to temper this offer met with notable failure. Mr. Williams may, in time, be shown to have been wrong, but he was not doubtful in his statements.

Mr. Wilfrid Froggatt of the Commission's Staff presented the only other detailed cost estimate for the three projects as proposed for construction by the Applicant. He estimated the total capital cost of the three projects, on the basis of private financing and construction, at $191,328,000 including $5,000,000 for fish facilities. This amount is about $58,328,000 higher than Idaho Power Company's estimate. It is to be noted, however, that the Idaho Power Company estimate did not include any amount for the cost of fish facilities even though "Idaho Power has expressed its willingness to comply with whatever requirements may be incorporated in the licenses in this respect" (Applicant's Opening Brief, p. 38). Although the Staff estimate of $5,000,000 for this item is more or less arbi-

trary, this figure should be included in the Idaho Power Company estimate of cost for comparative purposes. On this basis the Idaho Power Company estimate would approximately be $138,000,000, or about $53,328,000 less than that of Mr. Froggatt.

Mr. Frogatt, a graduate and registered civil engineer, has been in engineering work since 1922. Early in his career he worked on a variety of jobs involving hydraulic problems in water supply and irrigation and power generation. His professional life has been spent entirely in the West, and he did design work, and made quantity and cost estimates for a number of years for private engineering firms. Since 1936 he has been continuously employed by the Federal Government as an engineer, and in the San Francisco Regional Office of the Federal Power Commission, where he has performed field and office work on what would appear to be every kind of engineering work that the regional office has had to do—among which was "preparation of extensive detailed hydroelectric cost data". Since 1945, Mr. Froggatt's duties have included responsibility for the collection and analysis of current factual, basic cost data covering the construction, maintenance and operation of water power plants, preparation of engineering reports on the claimed cost of some 30 licensed hydroelectric projects involving over $280,000,000 and he has had charge of the field supervision of the construction and operation of numerous licensed projects which, he said "has enabled me to observe construction methods, participate in the solution of foundation and/or structural problems, and to check the construction and operation of hydroelectric projects." Listed among these supervised projects are Idaho Power Company's Lower Salmon, Bliss, and C. J. Strike Projects.

Witness Froggatt testified that he was aware of the fact that reasonably close estimates had been made with respect to several other Snake River projects by Idaho

Power Company, but in his judgment, such past experience by company engineers was of questionable value in establishing the estimates of cost for the Grand Canyon of the Snake, due to the differences in size of the projects involved, and the greater access problem due to the terrain of the country. "Possibilities for troubles in the final construction from the material that is presently at hand are much greater." Cross-examination by Idaho Power Company's counsel failed to uncover any weakness of the estimating approach used by Mr. Froggatt.

It would seem worthwhile to note and to emphasize that the Froggatt estimate is more than the result of the informed judgment of a single experienced engineer. The studies by the San Francisco office of the Commission—estimated at one time to exceed 40,000 man-hours of work—were checked, rechecked, and cross-checked. Lesher Wing, the Commission's San Francisco Regional Engineer, accepted and used the Froggatt cost estimate for various studies he made of the economics of the Idaho Power Company proposal, and was aware, early in the game, that Froggatt had come up with an estimate which topped the Idaho Power Company estimate by approximately 40 percent. It should be mentioned also, that experienced engineers in the Washington office who are among Staff Counsel's technical aides and consultants of record in this matter—T. M. Crum, J. M. Shepley, C. B. Walton, and J. J. A. Jessel—devoted many hours to the analysis of the Idaho Power Company estimates and did so with the San Francisco office data for comparison purposes. The Staff's technical analysis of the various construction cost estimates in this record is contained in Appendix B to the Staff's Brief.

The reasons for the major part of the difference between the two estimates, amounting to about $53,328,000, are not difficult to find. Mr. Froggatt includes about $18,137,000 to cover unforeseen contingencies and omissions whereas Idaho Power Company allows about

$10,121,000 for this item. In the Froggatt estimate unforeseen contingencies and omissions were estimated separately at the end of the direct cost estimates for each of the FPC accounts, and were derived by applying a percentage, ranging between 10 and 20 percent, to the estimated direct costs. In the Idaho Power Company estimate an allowance was made for contingencies in each item of work, with percentages being applied to these items ranging between 5 and 100 percent. Although Mr. Woodhead testified that an allowance was made for contingencies in each item of work, it is observed that in many cases his quantity estimates were considerably less than those of Mr. Froggatt. Most of these quantities are subject to rather accurate takeoff from design drawings, and spot checks of the estimates by the Staff show Mr. Froggatt's estimates to be the more accurate.

The estimates of direct costs for reservoirs, dams, and waterways by Mr. Froggatt are about $11,699,000 higher than the corresponding estimates by Mr. Woodhead. The principal difference in these two estimates lies in the unit cost of placed rock underneath the concrete facing. Mr. Woodhead used an average figure of $1.50 per cubic yard for the rockfill embankment material at all three dams and, under cross examination, testified that the average was arrived at by the use of $4.00 and $1.00 per cubic yard for placed rock and dump rock, respectively. On the basis of the unit costs shown above, it seems improbable that the quantities involved at all three dams would be such as to produce an exact average of $1.50 per cubic yard at each of the three dams. This would indicate that the figure of $1.50 per cubic yard represents the cost of dumped rock and that the $4.00 figure used by Mr. Woodhead for placed rock lacks basis. Mr. Froggatt gave careful consideration to this matter in his estimate of cost. In his estimate, Froggatt used $9.00 per cubic yard for placed rock and $1.50 per cubic yard for dumped rock. As is pointed out in the Staff Brief, Mr. Woodhead has had no

experience in the placing of rock beneath the concrete facings whereas Mr. Froggatt's estimates are based on first-hand knowledge of projects similar to those proposed.

Another large item in the difference of cost between the two estimates concerns the amounts allowed for overhead expenses, Mr. Froggatt's estimate for this item being about $6,644,000 higher than Mr. Woodhead's estimate. Mr. Froggatt used 7.5 percent of total field costs (direct costs plus indirects) for this item based upon an analysis of a number of claimed cost statements filed by utilities for projects licensed by the Commission. Furthermore, Mr. Froggatt found that the overhead for Idaho Power Company's lower Salmon project was 7.3 percent of the total field costs. This figure compares with the lower figure of about 4.5 percent used by Mr. Woodhead for the three projects concerned in the proceeding.

Interest during construction is another item in which there is a considerable difference between the two estimates. Mr. Froggatt assumed that the total construction expenditures would be outstanding on average one-half of the construction period, and on this basis computed interest during construction at $10,562,000, or about 6 percent of his estimate of capital cost. This compares with Mr. Woodhead's estimate of about $3,161,000, or about 2.4 percent of his estimate of capital cost. In this connection, it is noted that Witnesses DeLuccia and Riter used a method similar to that of Mr. Froggatt for computing interest during construction. Also, it should be noted that the Staff at page B-63 of its Brief states: "Williams also testified that he was not able to follow witness Woodhead's method of computing interest during construction and that it was too low (Tr. 18325)".

The matter of cost is of transcendental importance in this case because all of the other important economic figures are derived from it. We are dealing here with installations of fixed electric capacity and limited energy

output. As the capital cost is increased, the cost of the output of the development is increased proportionately. We shall see in a later portion of this report how this substantial variation in the estimate of the capital cost is reflected in the economics of the proposed construction.

I have adopted the capital cost estimate of the development as submitted by Witness Froggatt and this cost estimate will be used for economic analysis. Certainly, in a case of this kind where a choice must be made between two conflicting estimates the public interest would compel utilization of the estimate which if otherwise reasonable, would provide the greatest margin for error. The table in the Staff's Brief, Appendix B, page 93, which was derived from Mr. Froggatt's Exhibit No. 395, will here be adopted by the undersigned Examiner.

CAPITAL COST OF THREE DAM PLAN

Item	Oxbow	Brownlee	Low Hells Canyon	Total
Field Cost	$31,571,000	$79,175,000	$52,757,000	$163,503,000
Overhead Costs (7.5%)	2,368,000	5,938,000	3,957,000	12,263,000
Subtotal	33,939,000	85,113,000	56,714,000	175,766,000
Int. During Constn.	1,697,000	5,320,000	3,545,000	10,562,000
Total (before fish facilities)	35,636,000	90,433,000	60,259,000	186,328,000
Fish Facilities	....	....	5,000,000	5,000,000
Total	$35,636,000	$90,433,000	$65,259,000	$191,328,000

Three Dam Plan—Annual Costs

As previously stated, the capital cost of the three projects, based on private financing and construction, was estimated by Mr. Froggatt at $191,328,000 (including $5,000,000 for fish facilities), or about $58,328,000 higher than the corresponding estimate by Mr. Woodhead. The annual at-site fixed charges (interest, depreciation, taxes, and insurance) were estimated by Mr. Froggatt to be 10.61 percent of the investment (Ex. 361), as compared with Applicant's estimate of 6.418 percent (Ex. 102).

Annual normal operation and maintenance expenses were computed by Mr. Froggatt at $1,866,000 (including

$200,000 for fish facilities), or about four times Applicant's estimate of $452,200 for this item. The effect of the widely differing estimates pointed out above, as reflected in the resulting cost per kilowatt-hour of firm power from the three projects is shown in the table below. For the purposes of this comparison, it is assumed that the projects would produce about 4,888,000,000 kilowatt-hours of electric energy annually at-site, of which about 4,389,000,000 kilowatt-hours would be firm (Ex. 375). The secondary energy amounting to about 499,000,000 kilowatt-hours, is valued at 2.0 mills per kilowatt-hour. This shows, for illustrative purposes, the unit cost of at-site firm power from the three projects based on:

(a) Froggatt's estimates of capital cost and annual charges.

(b) Froggatt's estimate of capital cost and using Idaho Power Company's percentages for fixed charges and its estimate of operation and maintenance expenses.

(c) Idaho Power Company's estimates of capital costs and annual charges.

(d) Idaho Power Company's estimate of capital cost and using Froggatt's percentages for fixed charges and his estimate of operation and maintenance expense.

	(a)	(b)	(c)	(d)
Capital cost, ($1,000)	186,328	186,328	133,000	133,000
Fish facilities, ($1,000)	5,000	5,000	5,000	5,000
Total	191,328	191,328	138,000	138,000
Annual Costs, ($1,000)				
Fixed	20,300	12,279	8,857	14,642
Operation & Maintenance				
Power	1,666	452	452	1,666
Fish Facilities	200	200	200	200
Sub-total	1,866	652	652	1,866
Total, at-site	22,166	12,931	9,509	16,508
Revenue from secondary energy ($1,000)	998	998	998	998
Annual cost of firm-at-site ($1,000)	21,168	11,933	8,511	15,510
Unit cost of at-site firm energy, mills per kwh	4.82	2.72	1.94	3.53

The percentages used by Mr. Froggatt for computing the annual fixed charges at-site include 5.0 percent for the cost of money, 0.48 percent for depreciation, 5.03 percent for taxes, and 0.1 percent for insurance, making a total of 10.61 percent. This is somewhat comparable to Idaho Power Company's estimate of 6.418 percent which consists of interest at 6.0 percent and .418 percent for amortization of 95 percent of the project in 50 years and 5 percent in 25 years.

An important difference between the components of Froggatt's method and Idaho Power Company's percentages for fixed charges is that the Idaho Power Company percentage makes no allowance for taxes. As pointed out by the Staff (at page B-94 of its Brief) Mr. Roach, the Company's President, testified that "the amount of taxes (federal, state and local), that would be occasioned from the projects in the three-dam plan over a 50-year period, amounts to $487,541,050". The Staff points out that "According to witness Roach (Exhibit No. 27) the total capital investment attributable to the three-dam plan is $261,290,300, inclusive of transmission and substations. Based on this investment, 5.36 percent of investment would correspond to the amount of taxes". The Staff also points out that "Witness Froggatt's figure of 5.03 percent was checked against tax records on file with the Federal Power Commission". Accordingly, it is believed that the percentages for fixed charges should include a percentage for taxes and that Froggatt's estimate of 5.03 percent for this item is reasonable. Adding this percentage to Idaho Power Company's percentages for fixed charges, rather than the somewhat higher percentages of taxes estimated by Roach, gives 11.448 percent as compared with Froggatt's estimate of 10.61 percent. The greatest departure from the figure urged by Idaho Power Company, aside from the automatic and substantial increase due to the larger capital cost estimate used and the item of taxes, is in the item of operation and maintenance, where Froggatt's

estimate exceeds the estimate of Idaho Power Company's Witness Hogg and Robbins by about 370 percent! Witness Riter and Witness DeLuccia each estimated operation and maintenance costs and their estimates are very comparable to Froggatt's. According to the Staff, if DeLuccia's estimate had administrative and general expense, the two estimates would have been very nearly the same, especially since the method of estimating was the same.

We cannot reflect herein the detail in which this matter has been covered by the briefs nor considered by the Examiner. However, as in the case of the capital cost differences reflected in this record, I am striving to reduce the chances of error. If, however, the estimates accepted here prove, in time, to have been erroneous, the public interest will have been protected if the figures I choose are on the side of providing the greatest margin of safety. Accordingly, the Examiner adopts the higher percentages used by Froggatt in computing fixed charges and his estimate of operation and maintenance expenses, even though it is higher by far than Idaho Power Company's.

The Three Dam Plan—Power Costs, Power Values, and Power Revenues

One of the major perplexities presented by this case has been that of determining the worth of the power to be produced by the three dams as planned by Idaho Power Company. This attempt to evaluate the worth of the power in advance of its actual production involves to a high degree the exercise of informed judgment and the use of seemingly valid assumptions.

We are concerned here with a very practical matter. If Idaho Power Company builds three major hydroelectric projects on the Middle Snake in a five-year period or a nine-year period, it must derive revenues from the output of each project as each project is completed which will be equal to the annual cost of such project. Regardless

of what theoretical value may have been assigned to each project for planning purposes, if the revenue to be derived from each project is not equal to the cost of that project the fat is in the fire.

We may assume that within Idaho Power Company's service area, the rates at which the power will be sold to Idaho Power customers will be designed to recover the cost of the power *and no more.*[5] We cannot, however, assume that if Idaho Power Company is obliged to market a large segment of the power from its three dams in the general area of the Northwest, it can be assured of recovering the cost of the power, unless the cost is low enough to be attractive to prospective buyers. Those prospective buyers of power will, presumably, attempt to get additional supplies of power at the lowest possible cash outlay. If the power is obtainable from the Federal system at a lower price than from a private utility, presumably the purchase will be made from the Federal system, as long as such power is available. If the large municipal power systems in the Northwest have excess power for sale at a lower price than the same power available from a private system, the buyer will purchase his requirements from the municipal power systems. So it must be emphasized that theoretical values as used by power planners may have little if any relationship to costs. And, of course, unanticipated changes in the economic picture in a region—labor difficulties, war preparation or participation, widespread unemployment, may create a wide gap between power costs and power revenues, requiring rate adjustments to attempt to narrow the gap.

I do not think that a purely theoretical measure of value should be the determining factor in arriving at the economic feasibility of privately-financed and privately-con-

[5] Any other assumption would conflict with the principles of rate making, which seek generally to avoid requiring one class of customers in one area to pay costs which should be borne by another class or another area.

structed power developments. In taking such position, I realize that I may be running counter to considerable doctrine to the contrary, and that findings on this theoretical excess of value over cost have been made in a number of license cases in the past. In those cases there might have been the excuse for the practice in that all of the power to be produced by the proposed project would be utilized on the applicant's own system within a reasonable time. In the instant case it is admitted by all concerned that the output from these three projects will not be immediately usable on the Applicant's own system, and that varying amounts (which I will discuss at greater length in the portion of this decision which deals with marketing) will not only be available for sale but actually *will have to be sold to other utility companies in order to make the project pay out.* Thus, in order to get a measure of the "value" of the power which, presumably is to be purchased by these other unnamed utilities, I would have to have the data on what alternative sources of power were available *to those other utilities,* and what the comparative costs would be from their standpoint.

The assignment of a monetary "value" to the output of the projects which is based upon the cost of the next available and economical alternative source of power has only two useful purposes: (1) to determine whether or not the cost of the contemplated hydro is equal to or cheaper than steam or (2) to determine as between various alternative hydro plants which would be the more desirable.

If this "value" analysis is improperly used or if it is used carelessly so that the fact that it has no real relationship to either actual costs or actual revenues is obscured, some difficulties may be experienced in arriving at a valid result. It must be kept constantly in mind that true value is not an abstract concept but is really only the amount that something can be sold or exchanged for. Thousands of examples of this could be cited. Let us suppose a prospective purchaser who needs a new watch goes to a

jewelry store where he is shown two watches, either of which would serve his purpose, but one watch has a price tag of $30.00 and the other is priced at $50.00. The purchaser buys the $30.00 watch. Meeting a friend later and describing the transaction in the same terms we are evaluating power here, he would say, "My new watch cost $30.00. *It is a great bargain because it is actually worth $50.00.*"[8]

The cost of the portion of the output of the three dam plan which we can reasonably assume as absorbable in the Idaho Power Company system will be balanced against the cost of obtaining equivalent power from a modern privately-financed steam-electric plant for the sole purpose of determining which costs more. The cost of the portion of the output of the three dam plan which is excess to the reasonably-anticipated needs of the Idaho Power Company system will be balanced against the theoretical steam-hydro value figure which includes as a factor the amount that heavy industry could afford to pay for power and which is in use in the Northwest by planners of Federal projects (see H.D. 531, Appendix N, p. 4110). This value figure is approximately $16.50 per kilowatt-year for demand and 3.34 mills per kilowatt-hour for energy. It is to be noticed that this figure is considerably lower than the straight privately-financed steam-electric figures ($24.40 per kw and 4.5 mills per kwh), due, of course, to the necessity of recognizing that there are considerable undeveloped economically feasible hydroelectric resources in the Northwest and will continue to be for some time and also to the fact that whether or not the United States continues to expand its generating capacity, the large municipalities in the Northwest may be expected to add both hydroelectric or steam-electric capacity to the Northwest at a lower cost than the same capacity and energy can be provided by non-Federal private

[8] This is just another example of that famous aphorism of self-deception "a penny saved is a penny earned".

systems. These non-Federal public power systems have substantially the same cost-of-money advantage over private investment-owned systems as the Federal Government.

I am using this theoretical steam-hydro figure for testing the potential revenue of that part from the three dam output which is proposed for marketing outside of the Idaho Power Company service area for want of a better figure. It would be much more satisfactory if there was in this record the complete picture of the estimated cost of development of additional hydroelectric capacity by each of the prospective utility customers. But the record doesn't contain this data, and it is doubtful whether or not it could be obtained in any event.[7]

In the analysis of the marketability of the power from the three dam plan, I have felt obligated to lay aside these illusory "value" figures so that the proposal could be weighed in the light of the probable sales and probable revenues. I shall use the theoretical value figure for the Northwest as a theoretical maximum selling price for the excess power from the Idaho system, since it could hardly be expected that such power would ever be sold at large for more than this theoretical "value".

Three Dam Plan—Markets for and Salability of Power

Having determined the amount of power which will be developed by Idaho Power Company with its three dams, and the at-market cost of that power, it remains to ascertain whether or not such power or any substantial part of it is salable with a revenue return which will cover

[7] Just so that it will not appear that I am applying an alien test, it should be noted here that while the Applicant tested the economics of its projects with low capital costs, low annual costs, and high (steam-electric) values, there is a valuation of the output of the projects in the Applicant's Opening Brief on page 66 on the basis of what its counsel terms "the most conservative value used herein as value of power at market, i.e., 5.72 mills (Ex. 371-B, year 1956; Mr. Cotton used 6 mills, Ex. 50, p. 9)."

costs. Just as the proof of the pudding is in the eating, the economic feasibility of the projects of the Applicant will depend on whether there is a market for the power.

There has been an assumption used in many of the analyses made in this record to the effect that what Idaho Power Company cannot utilize in its own system will be needed by, and therefore readily salable to, other private utility systems in the Northwest.

Secretary of the Interior McKay's views and comments on this subject are interesting. He said:

> Any power which may temporarily be in excess of the Company's own requirements can be utilized to meet the needs of other power distributors or industries in the region until such time as the Company's own requirements will absorb the entire output from these projects, provided that the necessary interconnecting transmission facilities are constructed. Although the needs of the region are such that any temporary excess from the Company's plants could be used, the ability of the Company to arrange for the sale of the power will, of course, depend upon the price at which the Company may be able or willing to deliver the power. If the Commission's investigations indicate that the surplus power could be offered at an attractive rate, there is no reason why the projects should not be constructed as rapidly as possible, and the license should so require. If, on the other hand, the Commission's investigations indicate that the surplus power would be unmarketable because of the rate at which it would have to be sold, then there would probably be no purpose in requiring prompt construction of the projects. (Extracted from Page 6 of Exhibit 10)

The average annual at-market generation of the three dam plan operated in coordination with the Northwest Power Pool would be about 4,500,000,000 kilowatt-hours, of which about 4,050,000,000 kilowatt-hours would be firm and 450,000,000 kilowatt-hours would be secondary.

The at-market value of secondary power in the Northwest (and this is not theoretical because secondary energy

sales are actually being made currently on this basis) is 2.5 mills per kilowatt-hour. Deducting this secondary energy revenue from the at-market annual cost figure of $27,921,000, gives an at-market cost of about 6.6 mills per kilowatt-hour for the firm power from the three dam plan.[3]

In 1953, Idaho Power Company's average annual generation was reported to be 2,322,053,000 kilowatt-hours (265 mw), of which 2,047,332,000 kilowatt-hours (232 mw) is primary. The capability of the Idaho Power Company generating facilities, as shown in Exhibit 25, is 374 mw. The table which follows shows the capability and energy available from the Idaho Power Company in future years, assuming that a three-dam license is issued in July 1955 and that the three projects are constructed over a 9-year period as proposed by the Staff and over a 5-year period as proposed by Idaho Power Company.

	9-Year Constr. Period (Staff)			5-Year Constr. Period (IPCO)		
Year	Capac.	Primary Energy	Ave. Ann. Energy	Capac.	Primary Energy	Ave. Ann. Energy
	(All figures in mw)			(All figures in mw)		
1955	374	232	265	374	232	265
1956	374	232	265	374	232	265
1957	374	232	265	374	232	265
1958	374	232	265	525[2]	335[2]	383[2]
1959	734.4[1]	453[1]	497[1]	885.4[1]	556[1]	615[1]
1960	734.4	453	497	1157.4[3]	737[3]	825[3]
1961	885.4[2]	556[2]	615[2]	1157.4	737	825
1962	885.4	556	615	1157.4	737	825
1965	1157.4[3]	737[3]	825[3]	1157.4	737	825
1970	1157.4	737	825	1157.4	737	825
1975	1157.4	737	825	1157.4	737	825

[1] Brownlee added.
[2] Oxbow added.
[3] Hells Canyon added.

For the purpose of planning for the development of new power facilities, estimates of probable future requirements

[3] The Staff brief in this matter assigns a cost of 6.69 mills per kilowatt-hour to the output of the three dam plan (see Staff Brief, p. 22) but my computation was made independently, for test purposes.

of the Idaho Power Company were prepared by the Staff, as presented in Exhibit 373, and by Idaho Power Company as presented in Exhibits 24-A and 25. The Staff estimates, while less optimistic than those of the Applicant, are apparently acceptable to it (IPCO Brief, p. 20). A comparison of these two estimates is shown on the following page:

Year	Peak Demand, mw		Energy Requirements, mw	
	Staff	IPCO	Staff	IPCO
1955	467.2	443.0	313.47	282.3
1956	487.9	477.0	327.37	333.3
1957	512.4	503.0	343.79	350.3
1958	573.7	563.0	384.98	392.7
1959	618.6	660.0	415.05	471.2
1960	640.6	744.0	429.85	553.9
1961	669.0	801.0	448.87	568.7
1962	720.9	864.0	483.71	617.0
1965	790.6	——	530.49	——
1970	906.0	——	607.94	——
1975	1017.0	——	682.40	——

By comparing the supply with the estimated capacity and energy requirements it is possible to obtain the capacity and energy which would be surplus to the Idaho system requirements and therefore would be available for sale to other utility systems. In order to show the range here of surpluses, using the 5-year construction program with the Idaho Power Company load estimates, and the 9-year construction program proposed by the Staff with the Staff's load estimates, the following table has been developed from the evidence of record:

Year	Surplus Power Available on Idaho Power Company System [1] Based on Staff Load Estimates and 9-Year Construction Schedule (All figures in mw)			Based on IPCO Staff Load Estimates and 5-Year Construction Schedule (All figures in mw)		
	Capac.	Primary Energy	Av. Ann. Energy	Capac.	Primary Energy	Av. Ann. Energy
1955	(93.2)	(81.47)	(48.47)	(69)	(50.3)	(17.3)
1956	(113.9)	(95.37)	(62.37)	(103)	(101.3)	(68.3)
1957	(138.4)	(111.79)	(78.79)	(129)	(118.3)	(85.3)
1958	(199.7)	(152.98)	(119.98)	(38)	(57.7)	(9.7)
1959	115.8	37.95	81.95	225.4	84.8	143.8
1960	93.8	23.15	67.15	413.4	183.1	271.1
1961	216.4	107.13	166.13	356.4	168.3	256.3
1962	164.5	72.29	131.29	293.4	120.0	208.0
1965	366.8	206.51	294.51	—	—	—
1970	251.4	129.06	217.06	—	—	—
1975	140.4	54.60	142.60	—	—	—

[1] Parenthesis indicates deficit.

As can be seen from the foregoing, differences in the construction schedule followed and in the system load requirements estimated produce different amounts of disposable excess power. With a conservative load estimate and a long construction program as contemplated by the Staff, Idaho Power Company would have disposable capacity and energy in 1959 and subsequent years over and above its own system needs. In 1965 this excess would be more than the equivalent of its present system capacity and energy. If the three projects were built in five years, as contemplated by Idaho Power Company, and the FPC Staff estimates of system load requirements proved accurate, Idaho Power Company would have in excess of 436,000 kilowatts of capacity and 341,000 kilowatts of average annual energy available for sale in 1962 over and above its own system needs.

We have seen how this power will have cost about 6.6 mills per kilowatt-hour to produce and deliver to market, and the measure of the at-market value in the Northwest amounts to about 6.0 mills per kilowatt-hour. Will Idaho Power Company be able to sell these substantial surpluses? When one realizes that Bonneville Power Administration sells large amounts of firm power at about two mills per kilowatt-hour it is difficult to see where in the Northwest power in such amounts will be salable at triple the Bonneville rate.

Using Mr. Wing's table of values of power as representing the upper limits of the selling price for power in the Northwest, it is readily apparent that outside of Idaho Power Company's own service area, *the cost of the Idaho Power Company three dam output will always exceed the upper limit of the sales price for wholesale power in the Northwest*—and—even more remarkably—under the same Wing table—*this will also be so in 1980 when all of the additions to capacity in the Northwest will be steam-electric!*

While the Wing table of estimated "values" is based in 1980 on the cost of Federally-financed steam-electric plants,

and it is not entirely logical to assume—due to the constantly changing political climate—that the Federal Government necessarily will construct substantial amounts of steam-electric capacity, it is very logical to assume that public non-federal agencies (like the City of Tacoma and the City of Seattle) may construct such thermal capacity and that the Wing figure for 1980 may prove to have been a fairly accurate forecast of market value for that year.

There is no hint in the record of any indication by any potential customer for this power that such customer would be willing to sign up for power on a firm basis at 6.6 mills per kilowatt-hour. It seems strange that Idaho Power Company with substantial excess capacity in view would not try to get some kind of solid assurance from other utility systems that they would and could take such excess.

Mr. Roach, President of the Company, discussed this matter to some extent as a witness. His idea was that the output from the three dam plan would have a value[9] to the West Group of the Pool of between four and five mills per kilowatt-hour. It is clear that this estimate is an at-site appraisal, because Mr. Roach said "the record shows that so far the costs of these other transmission lines—that is the lines running over to the Northwest pool—are not included in the project cost. An energy that might be carried over these facilities would have to carry with it the costs incident to these facilities." Adding a one mill cost for transmission would make the Roach estimate for "value of power at-market" 5 to 6 mills, which is in line with the 6.0 mill value I am using in this analysis. Keep in mind that the *cost* of the power is 6.6 mills per kilowatt-hour, and that the cost has to be recovered from some source to make the projects economically feasible.

Mr. Roach's financial basis for building these plants leans on the sale of the excess power to the Pool on a per kilowatt-hour revenue which does not exceed 5 mills.

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[9] Mr. Roach was undoubtedly using "value" in the revenue sense here, otherwise his testimony would be meaningless on this subject.

Exhibits 147 and 148 sponsored by Mr. Roach show estimated revenues from the Northwest Power Pool assuming a 10-year and "accelerated" construction program. The "accelerated" program is obviously so far from practicable that I shall limit my comments to the 10-year program which corresponds roughly with the outer limits of the construction program recommended by the Staff. Mr. Roach estimated kilowatt-hour sales which correspond to his Northwest Pool revenue estimates. Arithmetic furnished the per kilowatt-hour revenue.

Year	Revenue in Mills per Kilowatt-hour at site
1955	4.85
1956	4.85
1957	4.46
1958	4.33
1959	4.27
1960	3.89
1961	4.80
1962	4.21

Unless some way could be devised properly to shift the costs around so that the Idaho system customers would pay more than the actual cost of the power they used, it would not be possible to sell excess power to the Northwest Pool on the basis of the financial study made by Roach except at a loss. It is sometimes possible to sell relatively small amounts of power at a loss without serious difficulty, but it is doubtful if the substantial quantities involved herein could be sold at a loss for very long without endangering the fiscal position of Idaho Power Company, and creating substantial rate problems with the Idaho regulatory authority.[10]

[10] Staff Counsel's Response of March 21, 1955, seems to indicate that if the overall revenues from the projects exceed the costs, the projects will be feasible. It would be necessary to overcharge Idaho customers to offset the reduced revenues from the sales of the excess power to other utility systems to achieve such a result (i.e. revenues equal to costs). It is doubtful that the Idaho rate

Idaho Power Company has the problem of having to try to sell power in an area that is price conscious to an unusual degree. Whether we agree with the philosophy which governs the marketing of Federally-produced power or not, we must face up to the economic facts of life—and one of those is that the Northwest area is a remarkably low-priced power area—and is famous therefor—and efforts on the part of anyone—whether it is a public agency or a private agency—to influence the cost of power by bringing higher cost power to the area will have a real battle on his hands. This is understandable. Most of the industrial growth of the Northwest has been based upon the cheapness of water power which has been relied upon to offset the higher transportation costs of materials and transportation of the processed raw materials to markets which, for the most part, are long distant from the Northwest.[11] Much of the individual investment in appliances by residents of the Northwest has been made on the basis of a very low sales price for power. When the Committees on Interstate Commerce of the Senate held hearings on S. 1725, it was brought out by Solicitor De Vane of the Federal Power Commission (quoting a speech of Chairman Frank R. McNinch) that the investment by consumers throughout the United States in electric appliances equals the investment of utility companies in generation equipment.[12]

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regulating authorities would subscribe to such a practice. This would be a form of subsidy to the out-of-state wholesale customers of Idaho Power at the expense of its own domestic customers. The fact that the Idaho customer would be paying less than he would have paid if steam-electric facilities had been installed instead of the hydro plants is completely irrelevant to this rate matter, since rates are not based upon savings computed on theoretical values.

[11] The Army Engineers in the Columbia River Review Report, House Document 531, noted the fact that "The low rate at which power is sold in the region has been an important factor in attracting industries which required an abundance of cheap power and in the high level of domestic consumption." (Vol. I, p. 92)

[12] Hearings, Public Utility Holding Company Act of 1935, pp. 244-245.

In the Northwest which has abundant water power, very limited fuel resources and low power rates, it is safe to assume that the individual user investment in electrical appliances far exceeds the United States' average.[13]

The really paradoxical aspect of this whole matter is that there is a crying need for firm power additions in the Northwest, in view of the lagging program of development by the Federal Government and the steadily growing loads. One of the seemingly attractive aspects of the Idaho Power proposals and one which has been exploited and publicized was that Idaho Power Company, would, without cost to the taxpayer, relieve this need to a substantial extent. There is a serious deficiency of power in sight at least by 1961 which should be planned for right now. This deficiency may appear sooner than 1961 if median water conditions are not experienced until that time. Whether power costing 6.6 mills is marketable on a firm basis is open to serious question even in spite of this power deficiency in prospect. Six point six mill power is fancy-priced power in the Northwest area. It is questionable whether it is preferable even to publicly-financed steam-electric power if the Wing table is a dependable guide to values. And of course experience has shown without any doubt that as price goes down, usage goes up. The converse is true, but to a lesser degree because of the investment already made in electrical equipment by users. Economists who testified in this hearing stated forcefully that as the price of power goes up in the Northwest, requirements tend to level out or to drop.[14] The predictions of deficiencies in the Northwest in 1961 are predicated on the proposition that no substantial increase in the current Bonneville rate will have occurred in the meantime.[15]

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[13] In the 1948 Review Report, the Army Engineers noted that the per capita consumption of power in the Northwest was "more than twice the national average". (Vol. I, p. 92)

[14] Goldhammer, Tr. 11,903.

[15] Goldhammer, Tr. 11,478.

This matter is not being considered under the delusion that Idaho Power Company intends to rush headlong into financial chaos and this decision will head the company off from ruin. Idaho Power Company is a well-managed and well-advised company and understandably jealous of its excellent financial standing. It will not build any project unless it knows fairly well in advance where the power output can be sold at rates which will return cost plus a satisfactory return on the invested capital. Even if it were to accept a license which required the building of the three proposed projects in a minimum of nine years, as proposed by the Staff, if the market for the power was not evident, there would be little difficulty under the Act in amending the license to eliminate one or both of the excess and unneeded developments. Neither this Commission nor any other governmental regulatory body could lawfully and effectively require construction of a hydroelectric project, a market for which did not exist.

Even so it would be clearly not in the public interest to license the three proposed dams when there is only a market reasonably predicted for the production of one of them. This Commission's Annual Reports over the past decades contain numerous instances of the denial of licenses and permits because of lack of market.[16] Also it would be against the public interest and a violation of Section 10(a) of the Federal Power Act to license any development which, if built, would actually foreclose truly comprehensive development of the Middle Snake River.

Having concluded that only one of these proposed dams should and would be built now by Idaho Power Company, it only remains to be considered whether building only one dam of a multi-scheme would be inconsistent with Section 10(a) of the Act.

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[16] For example, Projects Nos. 3, 168, 66, 226, 578, 592, 757, 1105, 1246, 741, 313, 324.

Comprehensive Development and Full Development

There has been an attempt on the part of some of the participants in this matter to make the term "comprehensive development" as set forth in Section 10(a) synonymous with "full development". What this would mean as a practical matter is that a license applicant would have to have a specific intent to accomplish full development of the waterway within a short time, or he would not be eligible for a license. To some extent, there has been a garbling of terminology in the hearing and in the briefs—where "units", "developments", and "projects" have been used interchangeably for some purposes and with distinctly different meanings for other purposes.

It seems clear that while the one dam would not constitute "full development" of the Middle Snake, the Act does not require such "full development" to be accomplished at one time. A reading of Section 13 of the Act (Appendix I) discloses the requirement that after a licensee has received his license, he shall commence construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof.

This same section goes on to provide that the licensee shall "complete and put into operation *such part* of the ultimate development as the Commission shall deem necessary to supply the reasonable needs *of the then available market*". Now notice that the development of the waterway is distinctly and, I submit, sensibly tied to the *market needs*. And notice, too, that the Act speaks of the *then available market*, rather than some speculative, possible market. Going on "and shall *from time to time thereafter* construct such portion of the balance of such development as the Commission may direct, so as to supply adequately

the reasonable market demands, until such development shall have been completed." [17]

One of the reasons the proposals of the Idaho Power Company have been so bitterly opposed in this hearing is because it seems that Idaho Power Company is primarily interested in the revenue-producing features of its proposed development, and has very casual interest in other aspects. As I read Section 13 of the Act, it was fully con-

[17] The following colloquy from the legislative history of the Federal Water Power Act may explain Section 13 and its relationship to "full" or "maximum" development.

The Chairman. There is another matter I would like to bring up while we are on this general subject, Mr. Secretary. What do you say as to the necessity of making it a condition when a right is granted, for the development of water power, that the licensee or the grantee shall be compelled to develop it, well, to its maximum extent?

Secretary Fisher. I think that is proper. I assume that is implied. I think there should be a provision for immediate development. It need not be maximum development, but progressive development until you get to the maximum. There is as much net public loss through a nonuse as through a misuse of the public resources. We want it to be used to the maximum capacity when the circumstances permit it to be done economically.

Mr. Sparkman. If you had the maximum development at the beginning you would have a considerable amount of power you could not use.

Secretary Fisher. I would say to the grantee: "If you can market all the power you can get from this water will you so develop all that water power?" He would probably reply, "Yes; we will develop as much power as we can get a market for." He would be asked the extent to which he believed the market would warrant the development of the power, and we would write into the permit that he shall develop this water power to a certain extent within a certain time, and that should be safely under what he reasonably can expect as a market, and there should be a provision that he shall go on and develop it to the maximum within a reasonable period by progressive stages.

(Senate Document No. 274, 62d Congress, 2d Session, "Hearings on the Development and Control of Water Power", p. 204)

templated that the only facilities which would be built under license would be those which supply a known power market. If the output of one turbine and one generating unit would supply the reasonable market needs, the development should stop temporarily right there. If the market requires a dam of certain proportions and no more, that's the kind of dam that should be built.

Section 13 seems to me to prohibit the tying up of power sites with no real prospect of developing them within the immediate future. It is pretty clear from the legislative history that one of the things concerning the people who contrived the Act was that some power company might try to stake out a whole river considerably in advance of its needs, thereby preventing someone else from utilizing the same water resources in the meantime, and that such monopolistic activities would be detrimental to the public interest.

While I think that it is likely there may be some day when Idaho Power Company will need all three of its proposed projects and perhaps more besides, I think that Section 13 requires the Commission to limit the licensing of power projects to those which will be built to meet a known market and which will be surely started and completed within a reasonably foreseeable time. To by-pass the real intention of the Congress as expressed in Section 13 of the Act—which was to keep people from being dogs in the manger on these desirable power sites—by the device of referring to the different proposed dams as "units" of a single project and thus permitting these sites to be held unused for a long period where there is no present need for development of them by Idaho Power Company for its own requirements does not appear to be justified and actually may be illegal. While it is possible that the only prospective developer that may be ever interested in the two sites not licensed herein is Idaho Power Company, the

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river must be kept open for others to use for power purposes.[18]

I conclude, therefore, that the fact that Idaho Power Company does not have access to a ready market for all of the power from the three projects does not prohibit the licensing of one of these projects, with Idaho Power Company still eligible to file new applications to construct such additional projects in the future as it may have a market for. When and if these other applications are filed, they will be examined to determine whether or not they are consistent with the comprehensive plan for the development of the Middle Snake River, and under the provisions of Section 10(a) the proposal as it is submitted will be licensed or the modification of such proposed project will be required before approval. It may be that the Middle Snake will never be "fully developed"—if a market for all of the power from that stretch of the river does not evolve. All that can be done at this time is to attempt to guard against the creation of difficult problems for others to attempt to solve many years in the future.

I am, therefore, approving the Idaho Power Company's proposal to build the Brownlee Dam (Project 2133) and the Presiding Examiner's Order in this matter will dismiss without prejudice the applications for Oxbow (Project 1971) and low Hells Canyon (Project 2132). The Brownlee Project will be discussed briefly as a separate project before setting forth specific Findings.

The Brownlee Project (2133)

Project 2133 (Brownlee) has been heretofore described (Table 1). An artist's version of the development is presented here on page 111. It will produce an average of about 232,000 kilowatts of electric energy annually at-site, of

[18] "Indefinite priority and control without development and use of power resources * * * (is) contrary to the policy embodied in the Federal Water Power Act." 14th Annual Report 156.

which about 221,000 kilowatts would be firm. The corresponding output at-market would be about 213,000 kilowatts and 204,000 kilowatts, respectively. Hence, the secondary energy at-market would be about 9,000 kilowatts, or 79,000,000 kilowatt-hours annually.

It has been explained heretofore why the cost of privately-financed thermal capacity cannot be used properly as the value gage of all of the output of the three dam project. Having also decided that the entire output of the three dams is not marketable at the present time either on the Idaho's system or in the Northwest generally, the relatively simple problem remains of determining whether or not Brownlee Dam, Project No. 2133, will meet the customary tests.

Under the Froggatt analysis as shown in Exhibit No. 361, the annual cost of the Brownlee project is as follows:

Fixed charges	$ 9,595,000
Operation & maintenance	766,000
Total cost at-site	$10,361,000
Transmission	2,646,000
Total cost at-market	$13,007,000

The annual cost shown above does not, however, include an amount for fish facilities. Assuming that the capital cost of such facilities is $5,000,000, as estimated by the Staff for the low Hells Canyon Project (2132), the corresponding annual costs for these facilities, based on 10.61 percent of the investment for fixed charges and $200,000 for operation and maintenance, would be $730,500. By adding this amount to Mr. Froggatt's estimate, the annual at-market costs to the Brownlee Project would be $13,737,500.

The output of the Brownlee Project will provide for all of the future power needs of the Idaho Power Company at about a cost of 7.6 mills per kilowatt-hour for firm power. Since the cost of power from an alternative steam-electric

plant would be about 8.7 mills per kilowatt hour, it is quite obvious that the Brownlee Project would be feasible as an undertaking by the company to supply its own needs. The evidence in this record to the effect that there are no other hydroelectric sites which can be developed by Idaho Power Company at the present time at a cost less than that of a steam-electric plant has been accepted herein. There is no reason for establishing a "benefit-to-cost ratio" for this project since I am assured that it would provide the lowest cost power that could be obtained by the company consistent with the comprehensive development of the Snake River required by Section 10(a) of the Federal Power Act.

Idaho Power Company has a present system capability of 374,000 kilowatts with a firm output of 232,000 kilowatts and an average annual output of 265,000 kilowatts. The addition of the Brownlee Project in 1959 will give the system a capability of 734,400 kilowatts, a firm output of 453,000 kilowatts, and an average annual output of 497,000 kilowatts. Using the Staff estimates of power requirements for the Idaho Power Company for 1959 and beyond, the following table shows the effect of the Brownlee addition. It is assumed for this purpose that the Brownlee addition will be first reflected in the company's system supply in 1959.

Year	Estimated Power Requirements		Existing Power Supply Plus Brownlee			Surplus Power on Idaho Power System		
	Capac.	Energy	Capac.	Firm Energy	Av. Ann. Energy	Capac.	Firm Energy	Av. Ann. Energy
1959	618.6	415.05	734.4	453	497	115.8	37.95	81.95
1960	640.6	429.85	734.4	453	497	93.8	23.15	67.15
1961	669.0	448.87	734.4	453	497	65.4	4.13	48.13
1962	720.9	483.71	734.4	453	497	13.5	(30.71)	13.09
1965	790.6	530.49	734.4	453	497	(56.2)	(77.49)	(33.51
1970	906.0	607.94	734.4	453	497	(171.6)	(154.94)	(110.94
1975	1017.0	682.40	734.4	453	497	(282.6)	(229.4)	(185.4

[1] Parenthesis indicates deficit.

The above tabulation which, of course, is based upon estimates insofar as Idaho Power's requirements are concerned, indicates that Brownlee will more than supply the future needs of Idaho Power Company at least until 1962. Between 1962 and 1965, some additional capacity must be added, and such addition might well be one of the projects license applications for which are being dismissed herein for reasons heretofore stated.

In closing the discussion respecting the Brownlee Project, it should be noted that the choice of Brownlee as the project which should first be undertaken by Idaho Power Company was not because it would be the largest of the three, but primarily because it is the only one of the three proposed projects which would provide any flood control and navigation benefits. It is evident from the Staff's Brief that the recommended order of construction contained therein was based largely upon the fact that Brownlee would provide needed flood control storage and navigation benefits, and that it would be in the public interest to first schedule the project which provides the greatest public benefits in addition to power benefits at the earliest date.

FINDINGS AND CONCLUSIONS

The findings proposed by the parties and by the Staff in this matter, while of inestimable value to the Examiner in the preparation of this report, were not deemed to be usable in the same form as submitted, even though the report is in substantial agreement with many of them. For this reason, few if any of the findings proposed have been adopted *in haec verba*.

Findings of fact and conclusions of law relative to the proposal of the Applicant, as expressed in its filed applications, in addition to or supplemental to those heretofore expressed, are as follows:

THE THREE DAM PLAN

(1) The applications in this matter relate to a three dam plan for development of the Middle Reach of the main stem of the Snake River. The Applicant has no intention or plan to develop the Middle Reach of the Snake River in any way other than that described in its applications on file with the Commission and open to public inspection, so the Commission's determination primarily must be made upon the applications as filed and as supported in the public hearing in this matter.

(2) The three projects as proposed by the Applicant would utilize the head and the stream flow satisfactorily.

(3) The three projects as proposed by the Applicant would occupy lands of the United States.

(4) The Snake River from its junction with the Columbia up to at least the mouth of Henry's Fork (Mile 837.4) is a navigable water of the United States.

(5) The three projects proposed by the Applicant would be located in and along a navigable water of the United States.

(6) The Brownlee Project, at Mile 284.6, the uppermost of the three projects and the only one having storage of any consequence, would affect the interests of interstate or foreign commerce by affecting the downstream navigable capacity of the Snake River.

(7) Section 23(b) of the Federal Power Act prohibits the construction of any water power project in the Middle Snake by any person, state or municipality without a license granted pursuant to the Federal Power Act.

(8) The plans submitted with the applications for the three dams would provide for the construction of safe and adequate structures.

(9) The Brownlee Project would provide important flood control storage and could be so operated to provide appreciable navigation benefits. The other two projects, being run-of-river plants, would provide no flood control or navigation benefits.

(10) Applicant has proposed to provide recreation facilities at each of the three proposed projects, and the recreational benefits so conferred would be important to the public.

(11) The cost of construction of the three projects as developed by the record of the public hearing in this matter, including interest during construction and an allowance of $5,000,000 for fish protective devices, is $191,328,000 (Ex. 359).

(12) The cost of the construction of the Brownlee Project alone, with interest during construction and an allowance of $5,000,000 for fish protective devices, is $95,433,000 (Ex. 359).

(13) The planned initial installed generating capacity of each of the three projects and their turbine capacity is as follows:

	Generating Capacity HP	Turbine Capacity HP
Brownlee Project	483,300	556,000
Oxbow Project	202,500	232,000
Hells Canyon	364,750	420,000

(14) The initial power plant capacities as proposed by the Applicant for the three projects is as follows:

	Installed Capacity Kw	Maximum Peaking Capacity— Kw
Brownlee	360,400	414,400
Oxbow	151,000	173,600
Hells Canyon	272,000	312,800

(15) The at-site energy that would be credited to the Brownlee, Oxbow and Hells Canyon Projects operated in coordination with the existing sources of supply in the area (as proposed by the Applicant) would be about 505,000 kilowatts of primary energy plus 52,000 average kilowatts of secondary energy.

(16) The at-site energy that would be credited to the Brownlee Project operated in coordination with the

Northwest Power Pool would be about 221,000 average kilowatts of primary energy plus 9,000 average kilowatts of secondary energy.

(17) The peak load requirements of the Idaho Power Company system have been increasing at an average annual rate of about 24,600 kilowatts during the ten-year period 1943 through 1952.

(18) If the entire output of the three projects were usable on the Idaho Power Company system as soon as this power could be made available, the annual cost of such hydroelectric power would be lower than the annual cost of obtaining equivalent power from the output of a modern steam-electric plant.

(19) The future peak load of the Applicant's system has been forecast as increasing at an average annual rate of about 30,350 kilowatts.

(20) The total installed generating capacity of 783,400 kilowatts that would be provided by the three projects under consideration could not be fully utilized in the Applicant's own system until at least the year 1975.

(21) That part of the capacity and energy which would not be absorbed by the Applicant's system when available, would have to be sold to other utility systems (within transmission distance) in the region in order to make the projects financially feasible.

(22) The part of the capacity and energy not usable on the Applicant's system would have to be sold to other utility systems at rates which would produce revenues which would be equal to the annual cost of this power including transmission cost.

(23) The record in this matter contains no information of any consequence which would lead a reasonable person to believe that there are any utility systems in the Northwest within transmission distance of the Idaho Power Company system which would be willing to contract for the excess capacity available at rates which would produce revenues equal to or in excess of the cost of the production of such power.

(24) Since the financial feasibility of any project depends entirely upon the marketability of the output of such project, reliable evidence that a market for the output actually exists or can be found must be presented before a license is issued or a project commenced.

(25) Under the conservative estimates of the cost of the three projects applied for as estimated and analyzed by the technical Staff of the Commission, the at-market cost of the power to be produced by the three projects would be about 6.69 mills per kilowatt hour.

(26) While the 6.69 mills per kilowatt hour cost is substantially below the 8.71 mills per kilowatt hour cost of privately-developed steam-electric power, this 6.69 mill cost is above the value of power in the Northwest which value represents a market value that it is expected may be reached sometime in the future.

(27) The prospects, as reflected in this record, for the sale in the Northwest of the large amounts of excess power that would be available from the three projects at rates which would equal the cost of the power are so feeble as to be worthy of no consideration.

(28) The estimated annual at-market cost of the power output of the three projects, including the annual cost of fish protective facilities, is $27,921,000.

(29) The annual revenues which may be expected from the sale of the power output of the three projects will vary from year to year, but may not be expected to equal the annual cost of the projects until such time as the entire output is marketable in the Idaho Power service area.

(30) An abstract valuation of the output of the three projects which has no relationship to actual expected revenue must be disregarded in the determination of whether or not the projects will be economically feasible for private construction.

(31) At the present time and until the year 1975, the economical feasibility of the three project development is extremely doubtful.

(32) The Brownlee Project output is largely usable by the Applicant on its own system within a foreseeable time and the Brownlee Project would be economically feasible since the annual cost of the Brownlee Project would be lower than the annual cost of obtaining equivalent power from a modern steam-electric plant. There are no other undeveloped hydroelectric sites available to the Idaho Power Company, except possibly the partially-developed Oxbow Project and the low Hells Canyon Project which would produce power at a lower unit cost than the Brownlee Project.

(33) While either the Oxbow or low Hells Canyon Projects would probably produce power at a lower unit cost than the Brownlee Project, neither should be developed prior to Brownlee because neither would provide flood control or navigation benefits and therefore would not, as initial developments, be best adapted to a comprehensive plan for the beneficial public uses set forth in Section 10(a) of the Act.

(34) The unit cost of the output of the Brownlee Project is about 7.6 mills per kilowatt hour as compared to a unit cost of 6.69 mills for the output of the three projects if the three projects were all built within the same construction period.

(35) Since the Brownlee Project would block the movement of undetermined numbers of anadromous food and game fish, no license should be issued for this project which does not require such protective facilities as may be required pursuant to the provisions of Section 18 of the Federal Power Act.

(36) Since the Brownlee Project would be expected to affect to some extent the habitat of the wildlife of the area, no license should be issued for such project which does not require that the Applicant take such steps as may be practical to alleviate the adverse effects, if any, upon the regional wildlife brought about by the construction and operation of the project.

(37) Such archeological investigations as may be necessary to preserve and protect these values should be required as a prerequisite to construction of the Brownlee Project.

(38) The operation of the Brownlee Project should be coordinated with the Northwest Power Pool, but since Idaho Power Company is now a participating member of the Pool and its existing system is now operated in coordination with the Pool, it would seem unnecessary to include in the license any provision which would appear to "require" such coordination, without specifying any detail as to how such requirement could be met.

(39) The Applicant is a corporation organized under the laws of the State of Maine, qualified to and is doing business in and under the laws of the States of Idaho, Oregon and Nevada, and has submitted satisfactory evidence of compliance with all applicable state laws insofar as necessary to effect the purposes of a license for the Brownlee Project.

(40) Under Section 27 of the Federal Power Act, the Act and license authority derived by virtue of its provisions cannot affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired therein. Any provision of the license to be issued in this matter which would seek to prohibit the Licensee from interfering with future depletions of the Snake River or with future upstream diversion would relate to subject matter which is not within the scope of the Commission's authority as set forth in the Federal Power Act.

(41) No conflicting application for the Brownlee site is before the Commission. Public notice has been given as required by the Act.

(42) The Brownlee Project will not use any Government navigation dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

(43) The issuance of a license for the Brownlee Project as hereinafter provided will not interfere or be inconsistent with the purposes for which any public lands have been withdrawn.

(44) The record in this matter demonstrates that the proposed Brownlee Project is best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development and for other beneficial public uses including recreational purposes.

(45) The record in this matter demonstrates that the proposed Oxbow and Hells Canyon Projects as proposed by the Applicant for construction within a fixed period in the future are not best adapted to a comprehensive plan for the improvement and utilization of water power development inasmuch as there is no foreseeable market for the power from these projects at a rate at which it would have to be sold.

(46) The three proposed projects, while planned as a single development, need not be authorized at one time by a single license. Under Section 13 that part of the ultimate development for which there is a market may be developed, and the remainder postponed until a market is available to justify the balance of the development.

(47) Section 13 of the Act contemplates that construction of a project shall commence within two years from the date of a license, and that this period may not, for any reason, be extended for more than an additional two-year period.

(48) To call completely separable power developments "units" of a single project in order that a license may be issued for all of the projects at once and the construction period of one of such separate power projects could actually begin at some time after the four year period specified in the statute would be a violation of Section 13 of the Federal Power Act.

(49) Section 13 of the Federal Power Act contemplates that no licensee would be permitted to hold water resources without development for an extended period, so that other citizens would have no opportunity to develop such potential power sites on streams over which Congress has jurisdiction.

(50) The installed capacity of the Brownlee Project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 556,000 horsepower.

(51) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act is reasonable as fixed and specified in the accompanying Order.

(52) In accordance with Section 10(d) of the Act, the rate of return upon the net investment in the proposed project, and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as specified in the accompanying Order.

(53) The Applicant should file revised Exhibits F, K, and L as provided in the accompanying Order.

(54) The amount of annual charges for the use, occupancy and enjoyment of lands of the United States to be occupied by the proposed project, including transmission line right-of-way, shall be hereafter fixed and specified by the Commission.

(55) The following described Exhibit J drawings and Exhibit M, filed as parts of the application for license for Project No. 2133, conform to the Commission's rules and regulations and should be approved as part of the license for the Brownlee Project.

Exhibit J:

(FPC No. 2133-1) Brownlee H. E. Development, General Map

Exhibit M:

General description and specifications of equipment for Project No. 2133 (one exhibit)

(56) Determination of the question of what transmission lines and appurtenant facilities shall be included in the license as a part of the project must be deferred until further information becomes available as to the way in which this project will be connected to the Applicant's system and the Northwest system. When this information becomes available, it should be fur-

nished to the Commission by the Licensee, and a preliminary Staff determination made which, if not acceptable to the Licensee, should be made the subject of determination by the Commission after notice and opportunity for hearing.

(Further Findings and Conclusions are set forth beginning on page 158)

Part II

THE HIGH DAM PROJECT

Genesis of the High Dam

We have heretofore dealt exclusively with the three dam proposal contained in the applications of Idaho Power Company. This Part will be concerned primarily with the principal alternative proposal to the three dam plan—the so-called High Dam Project or Hells Canyon Project. For reasons heretofore mentioned, the Federal Hells Canyon Project will be referred to herein as the "High Dam Project". The High Dam Project was first proposed by the Corps of Engineers as a unit in its plan for the comprehensive development of the Columbia River Basin in the United States. Subsequently, the High Dam Project proposal was taken over by the Bureau of Reclamation on the basis of an agreement between that construction agency and the Corps. The Bureau of Reclamation then began to study the matter intensively with the idea of obtaining revenue from the sale of the power to finance needed reclamation projects which appear to be too high in cost to be self-supporting, and the legislation it recommended to the Congress always included this irrigation aspect.

The Brief of the Applicant summarizes the legislative voyage of the High Dam as follows (p. 115 *et seq.*):

> * * * While Idaho Power's application for preliminary permit (filed June 23, 1947) was being held in suspense by the Commission, the question of the Hells Canyon project was the subject of hearings, both in

and out of Congress, and of much Congressional debate.

Public hearings had been held by the Army in 1947 on proposed plans for Snake River development, including specifically the Hells Canyon site. Its exhaustive 308 Review Report on the Columbia River and Tributaries had been completed in 1948, and was transmitted to Congress on February 14, 1950 (Item F, H.D. 531, p. v). Likewise, the Bureau of Reclamation, Department of the Interior, had completed its own report on the Columbia River, which was transmitted to the President on June 3, 1948, and to Congress on February 3, 1950 (Item E, H.D. 473, p. *3*).

There was then pending in the *81st Congress* the Omnibus Rivers and Harbors and Flood Control Bill, H.R. 5472, and the Army and Bureau reports to the Congress both contained an identical proposed amendment to H.R. 5472, to authorize for construction by the Department of the Interior a number of projects, including specifically the Hells Canyon dam. This amendment was transmitted to the Congress on February 3, 1950 (Item E, v. 1, p. *3-12*), and introduced in the Senate, 81st Congress, 2nd Session, as a Committee Amendment of the Senate Committee on Interior and Insular Affairs. Prior thereto, the subject matter had received consideration in both House and Senate during the 1st Session of the 81st Congress, as appears from the legislative history of the amendment contained in Senate Report No. 1351, no less than eight bills having been then introduced to carry out the purposes of the amendment to H.R. 5472 (Senate Reports, Vol. 1, 81st Congress, 2nd Session).

With this background of prior legislative study, and with the benefits of the detailed report thereon from the Senate Committee on Interior and Insular Affairs, the Committee Amendment to H.R. 5472 was called up in the Senate on April 10, 1950 (Cong. Rec. 4989, 81st Cong., 2nd Sess.). After lengthy debate extending over several days, it was tabled by a vote of approximately 2-to-1 (C.R. 5190).

During the debate, several other amendment to authorize Hells Canyon and other projects were offered. In these amendments the Hells Canyon project was before the Senate both alone and with other projects, and both with and without the controversial

"basin account" and "interest component" provisions. All of these several amendments were tabled, the last by a vote of approximately 4-to-1 (C.R. 5194).

Following defeat of the Hells Canyon authorization in the 81st Congress, Commissioner of Reclamation Straus prepared a new report dated April 11, 1951 (Item G, Ser. 20, p. 17-21); and the Secretary of the Interior sent a revised draft of proposed bill to Congress on October 8, 1951 (Item G, pp. 4-9, 12-13).

The bill was introduced in the *82nd Congress,* 1st Session, on October 16, 1951, as H.R. 5473, and referred to the House Committee on Interior and Insular Affairs. Subsequently, on March 7, 1952, an identical bill was introduced in the Senate (S. 2812, 82nd Cong., 2nd Sess.), and referred to the Senate Committee on Interior and Insular Affairs. Extended hearings on H.R. 5743 (sic) were held by the Subcommittee on Irrigation and Reclamation of the House Committee in March, April and June, 1952. After eight days of hearings the matter was indefinitely postponed by unanimous committee vote, and a motion to reconsider was laid on the table (Item G. pp. 733-736).

In the *83rd Congress,* 1st Session, on April 16, 1953, similar bills to authorize the Hells Canyon project were again introduced,—one in the Senate as S. 1664 (Ex. 342), and three in the House as H.R. 4648, H.R. 4649 and H.R. 4650,—with speeches of introduction in both Houses (Cong. Rec. 4-16-53, pp. 3322-40 and 3350-52). These bills were referred to the respective House and Senate Committees on Interior and Insular Affairs (C.R. 3340 and 3353).* The 83rd Congress has now adjourned, again without Hells Canyon action or authorization.

(* This footnote in the Applicant's Brief is not reproduced herein.)

Since the Applicant's brief was filed, a number of bills have been introduced in the present session of the Congress, both in the House and Senate. These are H.R. 4719, H.R. 4730, H.R. 4739 and H.R. 4740 and S. 1333, the latter being sponsored by Senator Wayne Morse and 28 other Senators. Suitable introductory speeches were made in the House and in the Senate in connection with

these bills and hearings by the Senate Committee on Interior and Insular Affairs have gotten under way. The pending bills, as nearly as may be determined, are identical, and each refers to the Hells Canyon Dam as described in Volume 2 of House Document 473, 81st Congress, 2d Session as modified by the report of the Commissioner of Reclamation, approved by the Secretary on May 11, 1951. Each of the bills would authorize, as well, the Scriver Creek power facilities of the Payette unit of the Mountain Home division, and join the Hells Canyon project with the Mountain Home Irrigation Project for financial purposes. There is no physical relationship whatever between the Mountain Home Project and the High Dam Project and the Congress could utilize High Dam Project revenues for any public purpose such as a grant-in-aid to schools or Public Health Research if it chose to do so.

The High Dam Project—Description

As recommended for construction by the Department of the Interior in House Document No. 473, the Hells Canyon Dam would be a concrete arch structure, 1,733 feet in length at the crest and 722 feet in maximum height at mile 247.3 on the Snake River. A spillway, consisting of two 42-foot diameter tunnels, would be provided with a design capacity of 300,000 cubic feet per second. The reservoir created by the dam would have a total controlled storage capacity of 4,400,000 acre-feet, of which 3,880,000 acre-feet would be usable. The power installation would be 800,000 kilowatts initially in eight units of 100,000 kilowatts each, and provision would be made for an ultimate installation of 900,000 kilowatts. Pertinent data for the project are presented in Table 2, page 128, and an artist's conception of the project, Exhibit 215 in this proceeding, is included here on page 129.[19]

[19] For contrast, the Company's version of the structure proposed for the Hells Canyon dam-site (Ex. 49) has been included here on page 130.

Table 2

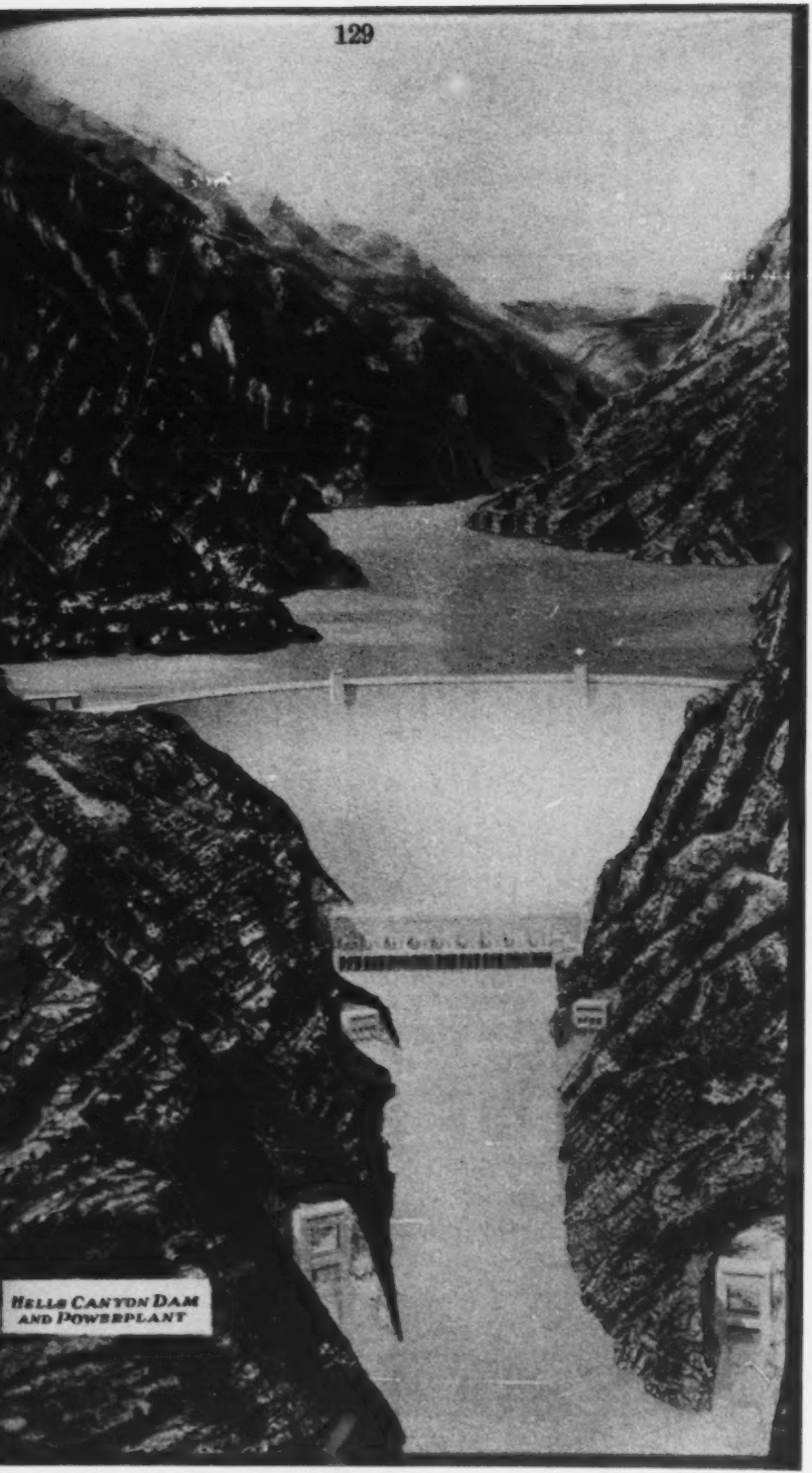
High Dam Project

Pertinent Data

1. *General*
   - Name—Hells Canyon
   - River—Snake
   - Stream mile from mouth—247.3
   - Drainage area, square miles—74,000
2. *Reservoir*
   - Maximum retained pool elevation, feet—2077
   - Minimum flood control pool elevation, feet—1923
   - Minimum power pool elevation, feet—1788
   - Total storage capacity, acre-feet—4,400,000
   - Usable storage capacity, acre-feet—3,880,000
3. *Dam*
   - Type—Concrete arch
   - Maximum height, feet—722
   - Elevation crest of dam, feet—2082
   - Crest length, feet—1733
4. *Spillway*
   - Design capacity, c.f.sc.—300,000
   - Type—2 - 42 foot diameter tunnels with intake gates
   - Spillway gates—4 radial gates 48 ft. x 59 ft.
5. *Power Plant*
   - Initial installation, kilowatts—800,000
   - Ultimate installation, kilowatts—900,000
   - Maximum power head, feet—602
   - Minimum power head, feet—313

Note: According to the World Almanac and Book of Facts for 1955, the following are the world's ten highest dams:

Name	Height (feet)
Boulder	726
Shasta	602
Hungry Horse	564
Grand Coulee	550
Ross	545
Fontana	480
Anderson Ranch	456
Detroit	454
Chambon (France)	450
Pine Flat	440



HELLS CANYON DAM
AND POWERPLANT

Exhibit 49

The High Dam Project—Capital Costs

The only detailed capital cost estimate for the High Dam Project in the record was presented by Witness Hoisington of the Department of the Interior, in his Exhibit 192. That exhibit shows the estimated capital cost of the project to be $356,810,000, base on January 1952 prices, and is summarized as follows:

1. Power plant	$ 77,000,000
2. Reservoirs, Dams and Waterways	155,930,000
3. Land and land rights, Roads, etc.	35,608,000
4. Transmission equipment	12,190,000
5. General property (Camp, etc.)	10,782,000
6. Communication facilities	80,000
7. Transfers to other Government agencies	200,000
8. Recreation facilities	1,000,000
9. Investigations, engineering, and general expense	59,020,000
10. Contingency reserve	5,000,000
Total	$356,810,000

From the preceding table it can be seen that Hoisington's capital cost estimate does not include interest during construction. In this proceeding it was assumed that the total construction expenditures would be outstanding on the average one-half of the construction period. Based on a 2½ percent interest rate and a construction period of 6 years, interest during construction for the High Dam Project would be 15 percent times $356,810,000 divided by two, or about $26,760,000. This figure compares with the estimate of Witness Riter, Chief Development Engineer, Bureau of Reclamation, of $26,800,000 for this item.

In addition to the above, the Hoisington estimate makes no allowance for fish facilities. In the Staff estimate of the cost of the three dam plan of development, an amount of $5,000,000 was added for the cost of such facilities. This amount, I believe should be included in the cost of the High Dam Project, at least for analysis and comparison.

The Federal investment for the High Dam Project adopted herein is $388,570,000 and is obtained by adding the above estimates for interest during construction and fish facilities to Hoisington's capital cost estimate. Although the adopted investment is based on prices obtaining in January 1952, I believe that, in any rough comparison with Mr. Froggatt's estimates for the three dam plan, there is ample allowance in Hoisington's contingency reserve to take care of the four percent increase in prices from January 1952 to July 1953, the latter date being the basis for the Froggatt estimate.

The High Dam Project—Annual Costs

The total annual cost of a hydroelectric development is the sum of the annual fixed charges and the annual cost of operation and maintenance. The fixed charges are generally considered to include interest on the investment, amortization, interim replacements, taxes, and insurance.

Interest

An interest rate of 2.5 percent is adopted as representative of present-day and foreseeable future average cost of long-term money to the Federal Government. This rate is recommended for use in the Bureau of the Budget Circular No. A-47, dated December 31, 1952. It was used by Staff Witnesses Riter, Ostrander, Cotton, Froggatt and Idaho Power Company's Witness Tonetti.

Amortization and Replacements

The estimated annual amount required to accumulate sufficient funds to repay the power investment at the end of the 50-year payout period and to provide for replacements is 1.43 percent. This percentage includes 1.03 percent for amortization, and is based on a 50-year sinking fund with interest at 2.5 percent, and 0.4 percent for replacements which compares with Witness Riter's esti-

mate of 0.408 and Witness Froggatt's estimate of 0.387 percent for this item. (Staff Brief, App. B, page 88).

Taxes

An allowance of 0.5 percent of the investment is adopted here for payment in lieu of taxes. This allowance was used by Witness Wing after discussion with representatives of several Federal agencies on this subject. It is to be noted that the March 12, 1954 agreement between the Departments of the Army and Interior and the Federal Power Commission provides that in justifying hydroelectric projects, taxes in an amount equal to those which would be forgone as a result of Federal development of the power, rather than the most likely alternative development, shall be included as an economic cost.

Insurance

The annual cost of insurance adopted herein is 0.1 percent of the investment. The same percentage was included in the nauual costs computed by Witnesses Froggatt and Tonetti.

Operation and Maintenance

The annual charges for operation and maintenance, as estimated by Witness Froggatt on the basis of reported costs to the Federal Power Commission, and including an amount for administrative and general expenses amounting to $1,495,000 is adopted. This figure may be compared with $1,065,000 used by Staff Witnesses Cotton and Riter, and Idaho Power Company's Witnesse Robins, and with $1,322,300 used by Witness Hogg. Mr. Froggatt's estimate of $200,000 for annual operation and maintenance costs of fish facilities at the three dam plan will be included here as the annual operation and maintenance costs of such facilities at the high dam.

Summary of Annual at-site Costs

The following table summarizes the total annual at-site costs for the High Dam Project:

Federal Investment	$388,570,000
Annual at-site Costs	
Interest (2.5%)	$ 9,714,250
Amortization and Replacements (1.43%)	5,556,551
Insurance (0.1%)	338,570
Taxes (0.5%)	1,942,850
Operation and maintenance	1,695,000
Total	$19,297,221

The High Dam Project—Power Output

Engineering witnesses who presented testimony regarding the power output creditable to the High Dam Project based their estimates on either the prime power method or the dependable capacity—average annual generation method. The prime power method is used by the Bonneville Power Administration, the marketing agent for Federal power in the Northwest, and is accepted here. The estimates of the prime power creditable to the project involve different assumptions as to the water supply available for power production, the length of the critical period, and the extent of development of the potential projects in the Columbia River basin over a 50-year payout period.

The estimates of water supply available for power production are based on U. S. Geological Survey records corrected for future upstream irrigation depletions. There was agreement among the witnesses that the average annual consumptive use of water diverted for irrigation was 1.75 to 2.0 acre-feet per acre. However, there was a considerable difference of opinion among these witnesses regarding the average number of additional acres to be irrigated over the payout period. Although some effect upon stream flow will result from the addition of new irrigable lands in the basin, the record clearly shows that

such an effect would not be significant insofar as the power potentialities of the Hells Canyon reach of the Snake River is concerned.

The length of the critical period used in the subject estimates ranges from 7 months to 42 months. At present, the critical period for the Pacific Northwest Power System extends over the seven months from September 1936 to April 1937. It is well recognized that as additional projects involving storage are constructed in this region the length of the critical period will increase. In this connection it is noted that the Corps of Engineers, in House Document No. 531, 81st Congress, 2d Session (Item F. Vol. VIII, page 4054), indicates that with the Phase C system of projects in operation (19,758,000 acre-feet of usable storage) the critical period will extend over 30 months from September 1, 1929 to March 1, 1932. Also, the Corps indicates that with the Phase D system in operation (43,741,000 acre-feet of usable storage) the critical period will extend over 42 months from September 1, 1928 to March 1, 1932 (*id.*, page 4068). Since it is logical to assume that additional projects involving storage will be constructed in the region within the foreseeable future, it follows that the critical period which determines the prime power output will increase in length from the present 7-month period. The evidence in the record shows that it would be reasonable to assume an average critical period of from 23 to 34 months for computing the prime power output of the High Dam Project.

The regulatory storage to be provided by the High Dam Project will increase the output of plants downstream.[20]

[20] It should be noted that in evaluating the High Dam Project full credit is given to that project for increasing the generation of downstream Federal projects both constructed and authorized. In evaluating the three dam plan under Part I of this Report, no credit was given to the three dam plan for augmenting generation at downstream Government plants because this benefit is of no value to Idaho Power Company from a revenue standpoint. The downstream benefits conferred by the three dam plan would be smaller because of the smaller storage involved in the Brownlee Project.

At present there are existing or under construction three hydroelectric developments located downstream from the High Dam Project namely, Bonneville, The Dalles, and McNary. In addition, there are five more developments authorized by the Congress. These are John Day, Ice Harbor, Lower Monumental, Little Goose, and Lower Granite. For purpose of computing the additional power output at downstream plants resulting from the regulation afforded by the High Dam Project the authorized projects are included in the power output studies used herein.

The regulatory storage capacity provided by the High Dam Project would require the installation of additional installed generating capacity either in the downstream plants or in other plants of the system in order to fully utilize the regulated flow. The Staff in Table 7 of its Main Brief indicates that the regulation afforded by the High Dam Project will require the additional installation of 793,000 kilowatts at such plants based on the prime power estimates of Staff Witnesses McIntyre and Cotton for a critical period of 34 months. The corresponding figures on the basis of prime power estimates by Witnesses Meadowcroft and Riter for critical periods of 23 and 31 months are 723,000 kilowatts and 733,000 kilowatts, respectively. The arithmetical average of these three estimates, amounting to about 750,000 kilowatts, is adopted herein as being representative of the additional capacity required to be installed at downstream plants to utilize the regulated flow provided by the High Dam Project. The annual costs of this additional capacity is given in Table 7 of the Staff Brief as $4.16 per kilowatt. On this basis, the annual costs of providing 750,000 kilowatts additional capacity at downstream plants would be $3,120,000.

Based on a careful review of the evidence relative to the prime power output of the High Dam Project and on the major assumptions as to a critical period of from 23 to 34 months and the inclusion of authorized projects in the

power studies, the power output estimates presented in the following tabulation appear to be the best of record.

PRIME POWER CREDITABLE TO THE HIGH DAM PROJECT

Name of Witness	Prime Power Output Average Megawatts			Length of Critical Period Months	Additional Irrigation Acreage
	At-site	Down-stream	Total		
McIntyre [1]	647	314	961	34	367,000
Riter [2]	654	257	911	31	631,000
Meadowcroft [3]	637	264	901	23	563,000

[1] Source — Exhibit 260
[2] Source — Exhibit 186
[3] Source — Exhibit 367

From the preceding tabulation, it can be seen that the prime power estimates range from 901 megawatts to 961 megawatts for the High Dam Project. The arithmetical average of these figures is about 924 megawatts, and is considered herein to be representative of the power output from the High Dam Project over the payout period.

The High Dam Project—Power Benefits

The value of the prime power output attributable to the High Dam Project at the point of generation for the system including existing and authorized projects, assuming it is salable at 70 percent load factor at-site, is $41.58 per kilowatt (Staff Main Brief, page 14). On the basis of this unit value and a prime output of 924,000 kilowatts, the annual power benefits attributable to the High Dam Project are about $38,420,000.

The High Dam Project—Flood Control and Navigation

Witness Fernald, in Exhibit 293, page 14, shows that the value of storage in the Middle Snake River area to the lower Columbia River would be in the order of $1.00 per acre-foot of effective storage. He testified that the effective storage at the High Dam would be 2,300,000 acre-feet. On the basis of the foregoing, the annual flood control benefits for the High Dam would be about $2,300,000.

Witness Fernald, in Exhibit 293 estimates the average annual navigation benefits for the High Dam Project to be $189,000. That estimate is adopted here.

The High Dam Project—Summary of Annual Benefits

The table which follows summarizes the annual benefits attributable to the High Dam plan of development:

Annual Benefits—High Dam	
Power	$38,420,000
Flood Control	2,300,000
Navigation	189,000
Total	$40,909,000

The High Dam Project—Benefits to Cost Ratio

The total annual costs of the High Dam Project derived hereinbefore are $19,297,221 at-site and $3,120,000 for the installation of additional units in downstream plants to utilize the regulated flow provided by the Project, or a total of $22,417,221. The annual benefits would be in the order of $40,909,000, indicating a ratio of benefits to costs of about 1.83 to 1.0. Such a ratio would be adequate to justify Federal construction of the project under usual planning criteria.

Comparing the Incomparable

As may be seen from the discussion in Part I hereof, the analysis and study of this record has been carried on and this initial decision prepared with a view to separating the Applicant's proposal as reflected in its applications from every other kind of proposal from whatever source. I think that if this initial decision and the Commission's final decision accomplish one result—that being the establishment of the proposition that privately-financed water resources development and publicly-financed water resources development are so completely different from each

other that they are not subject to sensible comparison—a major step will have been taken in clearing the way for more rational cosideration of similar problems which may arise in the future.

All of the briefs and the arguments in this case thus far have attempted—and, I suggest, without any genuine success whatever—to make comparisons between the only seriously considered alternative proposal to that of the Applicant—the yell-publicized High Dam Propect—and the three dam plan of the Applicant. In order to engage in these comparative mental exercises—certain very questionable assumptions have to be made and certain influential realities of the situation have to be absolutely disregarded. Governmental and social philosophies which have been evolving through the years are laid aside in a frantic effort to decide the matter "on the facts", as though there was something shameful about reaching a decision on some ground other than pure arithmetic, and even though the statute provides clearly that the Commission may and should exercise its judgment in the disposal of these matters before it.

I feel that there is such a wide gap between publicly-financed power projects and privately-financed power projects in the purposes and means of bringing about those projects that do not give effect to such difference in disposing of this matter would be akin to the method of hiding made famous by the ostrich.

The Applicant is well aware of the great basic difference in the two kinds of development (Reply Brief, page 7):

> Admittedly, power produced by a Federal agency which pays no taxes and has the benefit of funds from the Federal Treasury at low interest rates, can be sold at a lesser price than if produced by an investor-financed tax-paying entity. This would be true of any project that comes up for license anywhere in the United States.

The Staff, likewise, is aware of the nub of the problem when it says (Reply Brief, page 9):

> The matter of low power costs and rates resulting from Federal development, referred to by the Interveners, is not deemed to be one of the public purposes to be considered in relation to a finding under Section 7(b) of the Federal Power Act. If this were such a public purpose there would be practically no case where private development could be licensed because of the substantial difference in annual cost of investment money between Federal and private financing and because of the much higher annual cost for taxes paid by a private developer as compared with the annual "in lieu of taxes" payments, if any, under Federal development.

I feel that the High Dam Project must be judged on its individual merits—and the three dam plan of the Applicant judged on its individual merits. Because of the basic irreconcilable differences of philosophy behind each of the two ideas—and because of the radically different financing policy involved in public development which results in radically different economic results, it is utterly futile and a total waste of time to attempt to develop artificial and unreal bases for a "fair comparison" which has eliminated the most important aspects.

Those who have not attempted to read the lengthy briefs in this case would have no conception of the tremendously involved mental process which has taken place, and the great amount of labor which has been expended by conscientious technical personnel in attempting to equate the two propositions in the hope that a slide rule can be used to make the decision. In this process it was assumed that the two plans would be federally financed. This assumption—that the United States is a prospective builder of the three low dams—was never established as much more than a flight of fancy based on the proposition that the United States could build just about anything it wanted to. There is no evidence in the record which remotely suggests

that the United States might build three low dams on the Middle Snake River.

However, after this unreal assumption was made, steps were taken to determine the annual costs and the annual benefits for the two plans. When this was determined—one could draw a conclusion as to the economic limit of the magnitude of the plan of development for this reach of the Snake River basin. If the total annual benefits from the High Dam Project are greater than the total annual benefits from the three dam plan by an amount that exceeds the difference between the respective annual costs—then the High Dam would be economically justified. Conversely, if the incremental annual costs of the High Dam exceed the incremental annual benefits—then the High Dam would be economically infeasible.

Before such comparison can be made construction cost estimates must be derived. The High Dam costs have been estimated a number of times by the Bureau of Reclamation in connection with its past proposals to Congress. Its estimate is in this record, plus about a half dozen adjustments thereto by almost every expert who appeared as a witness. Detailed cost estimates for the three dam plan were presented by the Applicant, the Staff, and the Bureau of Reclamation. The differences in these estimates are rather remarkable, but are susceptible of analysis to discover reasons for the differences. The Staff invented a unique process for the purpose of reconciling these differences. This process involves the use of certain percentage "spreads" which were intended to compensate for differences in the estimating techniques used by the various estimators. The conclusions, if any, which were reached by such process were not used by the Staff as bases for any of its proposed findings.

Since all of these estimators were sworn as witnesses and were fully cross-examined, their estimates as set forth in the record are all that I am at liberty to use, and all

that I have used. Accepting only parts of an estimate or adding to or subtracting from an estimate seems to be a process quite different from that of applying an arbitrary percentage factor to a direct cost estimate. There is a limit to what properly may be done with evidence in the weighing of it.

It is hoped that the foregoing has illustrated to some degree the potpourri which has resulted from the various efforts to compare proposals which are basically and fundamentally different. It is hoped also that it will provide the justification, if any be needed, for considering and disposing of these matters separately, to the greatest extent possible.

The High Dam Project—Economic Superiority

The remarkable thing about the analysis by the Staff is this: if the advantages of Federal financing are applied to the three dam plan for purposes of comparison, the value of the incremental power benefits added by the High Dam is more than the costs of adding this increment. For example, Table 7 of the Staff Brief[21] shows the incremental power cost to be $41.28 per kilowatt on the basis of a 23-month critical period, as compared with a power value of $41.78 (Staff Brief, page 14), indicating a ratio of incremental power benefits to costs of about 1.01 to 1.0. So long as the benefits are equal to or in excess of the cost, the proposal is a feasible undertaking.

Just a word about "increment"—a term which the dictionary defines as "that which is gained or added". I am using the term here to describe that extra value which is gained or added by constructing the High Dam Project rather than the three dam plan, both schemes developing

[21] Table 7 is the only table contained in the Staff's Brief which is based, for the most part, upon the cost estimates presented by Witness Hoisington for the High Dam Project and Witness Froggatt for the three dam plan, without the application of the "spread" factors.

the same head and water supply, and the High Dam Project being considerably more costly, from a capital cost standpoint.

The "Green Book"[22] (page 13) describes it this way:

> The scope or scale of development of a project should be established at the point where the net benefits from use of resources for project purposes are at a maximum. Net benefits are at the maximum when the scale of development is established at the point where the benefits added by the last increment of extension of scope are equal to the cost necessary to add that increment of scope to the project. The least increment of scope to be analyzed is the smallest increment on which there is a practical choice as to inclusion in or omission from the project. At the point of maximized net benefits, the total project benefits will necessarily exceed the total project costs by the maximum.

This is the key finding in the Staff Brief in this respect:

> (20) Assuming financing, construction and operation by the same agency, the high Hell's Canyon project in the one dam plan would make possible the *production of the maximum amount of economical power* * * * and the cost of the power increment that would be provided by the one dam plan over the * * * three dam plan[s] *would cost almost as much as its value.* [Emphasis added]

The proposed finding is obscurely phrased. What it *says* is that on the basis of a theoretical comparison, the value of the power increment that would be provided by the one dam plan over the three dam plan would be equal to and greater than its cost. What it *means* is that if Federal planners were confronted with a choice between the three dam plan and the single high dam, the high dam would be indicated as the proper choice. The findings on

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[22] May 1950 report of the Sub-Committee on Benefits and Costs to the Federal Inter-Agency River Basin Committee entitled "Proposed Practices for Economic Analysis of River Basin Projects."

this subject adopted herein will be re-phrased appropriately. (Finding 153, *infra*).

The High Dam Project—Lower Costs and Lower Rates

Is the fact that Federally-produced power can be and is being sold at appreciably lower rates than the same power produced by an investor-owned utility one which should be taken into account in deciding whether or not a recommendation should be made to Congress under Section 7(b)? Both the Applicant and the Staff contend that this factor should be disregarded, alleging that if this factor were the determining one, licensing under the Federal Power Act would virtually come to an end, since the benefits of Federal financing give the Federal Government a substantial lead over any private utility which must seek its funds in the money market and rely upon its own credit in the obtaining of the use of funds for expansion. That it was the intent of Congress that the regulatory provisions of the original Federal Water Power Act be administered with a view to the protection of the interests of the consumers of power is evident from the express language of a number of sections of the Act.[23] For example, Section 10(a) of the Act prohibits combinations, agreements, etc. to limit the output of energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service. Clearly, it is the consumer's pocketbook that is being protected here. Section 19 of the Act requires as a condition of every license that the licensee shall abide by reasonable regulation of the services to be rendered to

[23] Evident also from the legislative history of the Water Power Act. Senate Report No. 898, 63d Congress, 3d Session, contains a statement of the views of Franklin K. Lane, Secretary of the Interior, wherein he observed that water power promised to be an invaluable resource and that in any legislation one of the evils to be guarded against would be "High rates to the consumer". In Senate Report No. 89, 64th Congress, 1st Session, the Committee on Commerce observed "The value of cheap power * * * is recognized by everyone."

customers or consumers of power, and of rates and charges of payment therefor, as fixed by the state regulatory agency involved, or, in the event there is no such agency, by the Federal Power Commission. Section 20 provides that if the power enters interstate commerce, the rates charged and the service rendered by any licensee "shall be reasonable, non-discriminatory, and just to the customer".

These statutory safeguards for the protection of the consumer make the conclusion inescapable that it was intended that the Act as a whole be administered with the interest of the ultimate consumer of power as the keystone of that Act.

Soon after its passage it became apparent that the Water Power Act could not be administered properly with borrowed personnel. Secretary of War Baker in a letter to the Chairman of the House Committee on Water Power dated December 31, 1920 pointed out how each of the functions of the Commission were related to protection of important public interests:

> The projects under application * * * involve a considerable portion of our resources * * *. They comprehend works of a magnitude greater than has hitherto been undertaken anywhere in the world in connection with power development. It will not be sufficient, therefore, for the commission to act in a merely perfunctory manner, either in approving the plans presented or in exercising supervision over construction, for in such plans will be involved the question of a proper degree of utilization of the resources available at the site and of the relation of the proposed plans to a comprehensive scheme of development. Furthermore, both plans and construction methods will influence the cost of the project, and such cost, under the provisions of the act, is not only a potential liability of the United States but *is also the base upon which service rates may be charged during the license period.* The responsibilities which, for the above reasons, the commission must assume in respect to the

> design and construction of projects is not exceeded by that of any peace-time agency of the Government. H.R. Report No. 1314, 66th Cong., 3d Sess. 11) (Emphasis added.)

That the Commission has been aware of its responsibility is evident from a number of expressions which have been made from time to time, particularly in its Annual Reports to Congress. In the 11th Annual Report it was observed that "always costs set a limit on rates". In the same Annual Report the Commission said:

> * * * in administering regulatory legislation which has to do with the development and control of the hydro-electric industry, the stressing of these governmental and political doctrines as to the division of rights between the State and Federal Government may seriously interfere with *the best economic interest of the people.* * * * Such cooperation [between the State Commissions and the Federal Commission] must recognize as its basic principle the real economic nature of the business with which it is dealing, that it is local in certain phases of its operation and national in other phases, and that the whole must be brought under some form of complete public governmental control and regulation which should bring about not only better service *and lower rates,* but establish the industry itself in such financial position that investment therein is safe and not speculative, and thus effectively preserve and promote the public interest. (11th A.R. 13-14) (Emphasis added.)

In 1935, there was added to the Federal Water Power Act portions of the Public Utility Act of 1935, which now comprise Part II and Part III of the Federal Power Act. In the amended Act there was spelled out an obligation to take such steps as can be taken through securities control, rate regulation, interconnection, and accounting controls, to protect the consumer and investor. Section 202 of the addition to the Federal Power Act states for a purpose the "assuring of an abundant supply of electric energy throughout the United States with the greatest

possible economy and with regard to the proper utilization and conservation of natural resources".[24]

In its 17th Annual Report, in 1937, the Commission, in reflecting certain comments it had made on pending legislation, said (pp. 4-5):

> * * * the main objectives of the bill * * * are extensions of a policy long ago declared by the Congress not only in the Federal Water Power Act of 1920 and the amendment thereof in 1935 but also in numerous other acts of Congress, such as those authorizing the Boulder Dam and Tennessee Valley Authority developments and other reclamation, flood control and navigation improvements, * * *
>
> In the opinion of this Commission, the Federal multiple purpose projects heretofore authorized by the Congress have justified the wisdom of the underlying Congressional policy that these public resources be developed by the Government to assure their combined maximum availability to and uses by the public *at minimum cost.* It is noted that the bill provides administrative machinery and proposes certain policies varying in some respects from those embodied in existing law, but it is our view that the main purposes of the bill are matters of paramount importance. *Even though this Commission's functions may be modified, we would deem that to be of secondary importance, the primary consideration being the social and economic advantages to the public.* (Emphasis added.)

In 1941, the Commission disposed of an investigation it had made into accounting disposition of expenditures

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[24] *Cf.* Commissioner Seavey's statement in Hearings Before the Committee on Interstate and Foreign Commerce, 74th Congress, 1st Session, on H.R. 5423, Part 1, pp. 391 and 392, " * * * the particular and immediate and continuing objective of this act is the protection and advantage of the consumers of electric energy throughout the United States and the protection of those who invest in the securities of the industry * * * the machinery of this regulation will permit * * * coordination * * * and there will be brought about conditions which will bring the maximum supply of energy for the minimum cost * * *."

by certain public utilities in the Northwest, wherein it found that approximately half of certain funds used to further the ends of the five companies were charged to operating expenses or the cost of rendering service to electric consumers, despite the fact that such expenditures were obviously not made for the benefit of such consumers.[25] Commissioner John W. Scott, in concurring with the majority, said:

> If activities such as the record discloses, defying the will of the public, are permitted to continue, the people may be prevented from obtaining the full benefits of cheap electric energy made available to them by the Bonnerville and Grand Coulee Dams.
>
> The public has invested millions of dollars in these great projects, not for the purpose of increasing the profits of the private utilities, *but to provide cheap electric energy for consumers generally.* Not only is this public purpose threatened by the utilities' activities, but the great public investment itself is endangered. To make accounting entries or adjustments in the books of the utility companies is no solution of the basic problem posed by the record in this matter. The important thing is the adequate protection of the inherent right of the people to make economic and social progress and to permit them to utilize and enjoy a great natural resource. (pp. 378-379) (Emphasis added.)

In a statement made in 1947 to the Chairman of the Committee on Interstate Commerce, which Committee was considering H.R. 2972 and H.R. 2973, the Chairman of this Commission said, among other things:

> In the administration of the rate provisions of the Federal Power Act, the Commission has succeeded in establishing the prudent investment principle of rate making, which has brought with it considerable

[25] In the Matter of Northwestern Electric Company, Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, Washington Water Power Company, IT-5647, 2 FPC 369.

direct results and probably *much greater indirect results in annual reductions in rates to consumers.*

The authority, upon request of another electric utility or a State commission, to require an interstate company to interconnect and sell electric energy at wholesale would similarly revert to the no-man's-land under the proposed amendments. This authority is associated in the act with the *congressional purpose to assure an abundant supply of electric energy with the greatest possible economy* and with regard to the proper utilization of and conservation of natural resources. (Emphasis added.) (From Hearings before a Subcommitte of the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on H.R. 2972 and H.R. 2973, page 7)

It must be kept in mind that many of the great public undertakings which have taken place in the past several decades have had as a prime purpose the furnishing of large amounts of electric power to consumers at low rates. In 1937, there was the Bonneville Project Act, a law which put the United States into a business field on a non-profit basis theretofore nearly the exclusive realm of investor-owned private corporations. Some few years before this, the people of the United States, through their duly elected representatives, had breathed life into a precursor of the Bonneville Power Administration, the Tennessee Valley Authority, a social experiment which has provided a legislative blueprint for the business activities of the United States wherever they have taken place since.[26] The Congress of the United States directed the Authority to take steps to "promote the wider and better use of electric

[26] The Boulder Canyon Project Act antedated the Tennessee Valley Authority Act by several years but there are a number of distinct differences in the two acts. For example, the Boulder Act required the Secretary of the Interior to have contracts for power and water from the project before any Federal money would be appropriated or before any work was done or contracted for. Also, the Boulder Act provided for sales and delivery of energy at the switchboard, under contracts up to fifty years in length.

power for agricultural and domestic use" and to work toward "the application of electric power to the fuller and better balanced development of the region." The marketing policy of the Government was declared to be "so far as practicable to distribute and sell the surplus power generated * * * equitably among the States, counties and municipalities within transmission distance." Further, "This policy is further delcared to be that projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly, that sale and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity."

The Bonneville Act, like its predecessor just mentioned, provided for preference purchases of power by public bodies and cooperatives, and also provided for rate structures which would be based upon a policy of "encouraging the widest possible diversified use of electric energy". The said rate schedules, the Act continues, "may provide for uniform rates or rates uniform throughout prescribed transmission areas in order to extend the benefits of an integrated transmission system and encourage the equitable distribution of the electric energy developed at the Bonneville project." The Act provides for the drawing of rate schedules having regard to the recovery of the cost of producing and transmitting such electric energy including amortization of the capital investment.[27]

[27] The Bonneville rate schedules are, by law, based upon an allocation of costs made by the Federal Power Commission and are only effective upon confirmation and approval thereof by this Commission.

House Document 531, the Army's Review Report on the Columbia, had this to say (Vol. I, p. 93):

> The entry of the Federal Government on a broad scale into the business of power generation and transmission in the Northwest has resulted in widespread public demand that the policy be continued. Even the utility companies which at first opposed the Federal power program, have joined in demanding that the Government continue power development. The Northwest Utilities Conference Committee, representing the largest segment of the power business in the nation, has issued a public statement as follows: "The assumption of this utility responsibility by the Federal Government has caused investors and management of both publicly and privately owned industrial and power distribution enterprises in the States of Oregon and Washington to plan their investments and developmental programs in the belief that this Federal policy will continue.

In view of the foregoing policy expressions in the laws the Commission administers and helps to administer, and in view of the facts respecting resource development in the Northwest, sharp issue must be taken with the statement of the Staff in its Reply Brief (page 9) that the matter of lower power costs and rates resulting from Federal development "is not deemed to be one of the public purposes to be considered in relation to a finding under Section 7 (b) of the Federal Power Act." It is axiomatic that governmental regulation of utilities is derived almost entirely from the need for protection of the ultimate consumer, and to a lesser extent, of course, the investor. I must conclude, therefore, that the prospects of lower cost of development and resultant lower rates to the ultimate consumer of the power to be produced are important considerations in the decisions which must be made in this field of resources management and development. This is not to say, as the Staff Brief would indicate, that in every case where it is found that the Federal Government could develop the resources at a lower cost and could, therefore,

market the power at a lower rate, private development could not be licensed. While cost is an important factor, it is not necessarily the decisive factor.

Section 7(b)—Guides to Interpretation

I do not feel that this is a proper instance for the invoking of the provisions of Section 7(b) by the Commission even though the facts seem to point to the inescapable conclusion that with the marked and substantial advantage of the Government's credit, the High Dam would be dollar for dollar the better investment and the more nearly ideal development of the Middle Snake. There are two important reasons which should guide a judgment in this matter, which will now be discussed.

In the Roanoke Rapids Case (In the Matter of Virginia Electric and Power Co., Proj. No. 2009, 10 FPC 1), the Commission's Opinion adopted a finding which had been made in one of the Examiner's two Decisions in that matter.

> (58) The evidence received does not show that the Roanoke Rapids site would be developed at any time by the Federal Government, should the pending application for license be denied. Such denial would of course permit the water, which the applicant plans at once to utililize, to continue to be wasted to the sea. (p. 17)

In that Opinion, the Commission said:

> The only public benefit to be obtained through development of the Roanoke Rapids site will be through the generation and distribution of electric power, whether that site is developed by the United States or by some other interest. * * * As shown by the examiner, Congress has been aware of the pendency of the application for the Roanoke Rapids site and of the possibility that a license might be issued for construction of a power plant by the applicant which would preclude Federal development of that site. There has been no move, however, to obtain con-

> gressional authorization for Federal development of the Roanoke Rapids site by the United States.
>
> The Federal Power Act looks to prompt development of water resources where such development is feasible and in the public interest and it gives to the Commission discretionary power to delay utilization only where such delay is found to be imperative. * * * The Power Act accords to the consumers served by the applicant the right to obtain the benefits of water power development and they should be given those benefits as quickly as possible. (p. 4)

I do not mean to imply that the Roanoke Rapids Case is on all fours with the present matter, but I do think there are certain important similarities. The differences are, of course, that there have been a number of serious attempts to obtain Congressional approval of the High Dam Project and also that the Roanoke Rapids Project was a pure power project whereas the High Dam Project is a multi-purpose project.[28] The similarities are found in the fact that the waters of the Middle Snake are being permitted to run unused to the sea while this controversy continues, and that the Idaho Power Company service area is in demonstrable need of more generating facilities very soon. Another similarity lies in the lack of likelihood of any favorable action by Congress on the High Dam proposal within any foreseeable time, as demonstrated by the withering of the proposals in the previous sessions of Congress, even when sponsored and rigorously promoted by the then Secretary of the Interior, in a political climate more favorable to acceptance of such proposals.[29]

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[28] In dollars, however, the High Dam's power values represent approximately 94% of its total value. See page 47, *supra*.

[29] *Cf.* The President's Letter to the Chairman of the Joint Committee, dated November 10, 1954. Contained in Hearings before Joint Committees on Atomic Energy on Exercise of Statutory Requirements of Section 164, Atomic Energy Act of 1954—Utility Contract Between Atomic Energy Commission and Mississippi Valley Generating Company, 83rd Cong., 2d Sess. 501 (1954).

That consideration may be given, with propriety, to the likelihood of the fruition of a recommendation under Section 7(b) in reaching a decision as to whether such a recommendation should be made is shown by the opinion by the United States Court of Appeals for the 4th Circuit in the Roanoke Rapids Case reviewing the Commission's action, (U. S. ex rel. Chapman v. Federal Power Commission, et al., 191 F. 2d 796) where the Chief Examiner's report is quoted with approval. The quoted report said (809):

> * * * The probability is that so far as the United States is concerned, the water resources at Roanoke Rapids are destined to be undeveloped and unutilized for a long time to come. It is not believed that such wastage or nonutilization of water resources can be in the public interest, particularly when there is a need for the energy in the area and a private developer with private capital stands ready, willing, and able to utilize them, with the protection of the public interest furnished by the terms and conditions of a federal license.

The Court further said (809):

> In this situation, it cannot reasonably be said that the Commission has abused its discretion * * * because it does not refuse a license for construction by private enterprise of this project which Congress has shown no intention of constructing.

The Supreme Court of the United States in its review of the matter also adverted to the Examiner's Decision of March 17, 1950, which had been quoted from by the Court below.

> Particularly relevant in this regard is the estimate that public development at this site would not in the normal course be undertaken for many years. (Chapman v. Federal Power Commission, 345 U.S. 153, 169)

Some of the interveners in this matter seemingly have the idea that all that would be needed to assure the au-

thorization and appropriation for the High Dam Project by Congress would be for the Commission to reject the applications herein in their entirety and take appropriate action under Section 7(b). While the Congress might be expected to give consideration to such a recommendation, it is doubtful in the circumstances—where Congress has been giving consideration to development of the Middle Snake River for a number of years—that any expression by this Commission on the subject would have any appreciable effect.

I conclude that, on the basis of facts before me, including the legislative history of the various Hells Canyon bills which have been heretofore presented to the Congress without success, the likelihood of the authorization of and appropriation for an undertaking of the size involved in the High Dam Project is so remote as to make a recommendation to the Congress under Section 7(b) that such a dam be undertaken by the United States a completely useless action. Such action, which in these circumstances could not be expected to produce more results than any of the bills which have been introduced and sponsored in the past by the Secretary of the Interior and various energetic legislators, would serve only to freeze the Middle Snake River for hydroelectric development for an indeterminate period in the future. Just as the Examiner and Commission in the Roanoke Rapids Case were convinced of the need to harness the waters of the Roanoke River at earliest practicable date, I am convinced that the non-utilization of water resources could be in some circumstances just as short-sighted as less than maximum development. Keeping the consumer in mind—if the denial of all of the applications herein would have only the practical result of driving the Idaho Power Company to a steam-electric program at a much higher cost and with resultant increases in rates for power—I am doubtful that such action would be in the public interest. Only if such denial were to pave the way for lower cost power for those con-

sumers would I believe such a denial would be in the public interest. I do not feel that it would be in the public interest for the Commission to take any steps the practical effect of which would be to delay indefinitely the use of these waters for power purposes and for the other purposes that would be served by the development of the water resources.

Just as I have refused to approve the issuance of licenses for all three of the sites for which Idaho Power Company has sought license authorization because of the Applicant's failure to show a market which would provide some assurance that the licensee would proceed at once with the development of all of the sites (and I feel that Section 13 of the Act prohibits the Commission from tying up these sites unused, even if it were inclined to do so), I feel that the tying up of the Middle Snake River without use for an indefinite period (which I feel would be the practical result of a finding under Section 7(b) that these resources must be reserved for the United States alone) would be just as questionable from a public interest standpoint.

The second reason for my not utilizing the provisions of Section 7(b) in this matter is that I feel that Section 7(b) is not truly applicable to this case. The High Dam proposal has been before the Congress a number of times and is before the Congress now. All of the pertinent engineering facts relating to the High Dam Project which have been used for study in this case are published and have been the subject of Congressional hearings in the past. The "examinations, surveys, reports, plans, and estimates of cost" which would be forwarded to the Congress under Section 7(b) would be the same for all practical purposes as those which have been submitted to the Congress in connection with the legislation of the past sessions. There are, of course, certain adjustments of cost estimates which would be made due to the change of

prices of materials, but these changes are somewhat insignificant in the big picture.

This matter is before Congress now, and there has been no secret of the fact that Commission hearings have been held and applications by Idaho Power Company have been under consideration for several years for the construction of projects by that company which would preclude any Federal development of the same stretch of the river. The matter is so highly publicized that it would be difficult to find a member of the Congress who has not some acquaintance with the problem. That the attention of Congress will be called to the proposed issuance of any license in this matter, there can be no doubt. If the Congress feels that the Commission has not performed its function in the public interest and in accordance with the provisions of the statute, the Commission's power to issue a license may be withdrawn or suspended at any time. The general power to issue licenses in national parks and national monuments was withdrawn in 1921 from the Federal Water Power Act, and in 1928 the Congress prohibited the issuance of permits or licenses upon or affecting the Colorado River and all but one of its tributaries for a period.[30] There is nothing to prevent Congress from imposing a similar restraint upon the Commission's licensing power in this matter if it is felt that an abuse of discretion has been committed to the detriment of the public.

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[30] "This resolution was adopted for the purpose of suspending action on applications then pending on the Colorado River in order that rights might not be acquired which would interfere with the solution of the Boulder Dam project." See Letter of the Chairman, Dwight F. Davis, Secretary of War, as contained in H. R. Report No. 2313, 70th Congress, 2d Session. The portion of the Boulder Dam Act referred to will be found in Appendix I hereto.

FINDINGS AND CONCLUSIONS

(*Continued from page 124*)

(57) A plan of development, designated as the two dam plan, has never been proposed to be undertaken by Applicant or by any other private or public body, and there is insufficient evidence in the record to warrant its consideration either for private construction or for construction by the United States.

(58) The High Dam Project heretofore recommended by the Department of the Interior and supported by the Department of the Army, is urged by some of the Interveners for Federal construction, financing and operation; the three dam plan is proposed by the Applicant for private construction, financing and operation.

(59) The three dam plan has never been proposed by any Federal agency for Federal development nor has any non-governmental agency proposed the development of the High Dam Project.

(60) The Columbia River Basin is an interstate, international basin, and the Snake River is the largest tributary of the Columbia River.

(61) The comprehensive plan for development of the Columbia River and its tributaries for flood control, navigation, power production, irrigation, recreation and other purposes is embodied in the "308 Review Report" of the Corps of Engineers, Department of the Army (H.D. 531, 81st Congress, 2nd Session) and the 1947 Columbia River Basin Report of the Department of the Interior (H.D. 473, 81st Congress, 2nd Session). These reports were brought into accord by the April 11, 1949 agreement between the Secretaries of the Army and Interior (H.D. 473, Vol. 2, pref., pp. 23-32 and the aforementioned Reports were officially noticed for the purpose of this proceeding.

(62) If the comprehensive plan were carried out to its fullest extent, it would develop approximately 125 million acre-feet of storage for flood control and river regulation, about 32 million kilowatts of firm

power, some 500 miles of uninterrupted inland navigation, a total of about 8 million acres of irrigated land. Fishery resources would be protected; mineral and other resources development would be forwarded. However, no detailed analysis for economic determination of the ultimate plan has been made. The plan has heretofore been characterized by this Commission as "a desirable and coordinated basic framework for the comprehensive development and utilization of the water resources of the Columbia River."

(63) The Review Report of the Army Engineers summarized studies of the present and anticipated future needs of all the various parts of the basin for flood control, power, irrigation, recreation and other water use purposes, and embodied consideration of relative needs of various parts of the basin, desires of local and state interests, and the importance of various water use functions. It recommended a plan of development which was coordinated to meet the needs of the basin, to the extent economically justifiable, for a number of years to come as regards flood control, power, navigation, and irrigation, and indicated in more general terms, how further needs might be fulfilled at a later date, consistent with present development.

(64) The core of the comprehensive plan is the so-called Main Control Plan.

(65) The Main Control Plan consists of a series of large, multiple-purpose reservoir projects to be operated as a coordinated system which, in conjunction with lower Columbia River levees, will control main-river floods, improve inland navigation, and furnish a large part of the power requirements of the region. Power considerations were the most important in the economics of project selection.

(66) The Main Control Plan includes the Hells Canyon Project, which is called the High Dam Project for purposes of this proceeding.

(67) More than $1 billion of Federal funds have been invested in projects of the Main Control Plan existing or under construction.

(68) The existing projects of the Main Control Plan, together with the regional Northwest transmission grid, constitute an electrically and hydraulically integrated Federal Power system.

(69) The Main Control Plan is designed to achieve approximately 27 million acre-feet of storage for flood control, approximately 12 million kilowatts of installed generating capacity, practically the entire 500-mile inland navigation route, and extensive irrigation, recreation and other public benefits.

(70) Approximately 7 million acre-feet or about one fourth of the flood control goal of the Main Control Plan has been achieved. The projects existing and under construction, as of 1954, will provide about one-half of the power objective of the Main Control Plan.

(71) Well-placed upstream storage is an essential element of the Main Control Plan and the comprehensive plan.

(72) The High Dam Project was planned as a key upstream storage project in the Main Control Plan; it would contribute appreciably to the objective of the Main Control Plan.

(73) The High Dam Project is the farthest upstream and the only storage project in a chain of six projects in the Main Control Plan for developing the Columbia-Snake waterway; the five downstream plants (John Day and the four Lower Snake projects) have been authorized by the Congress.

(74) The High Dam Project power facilities would be interconnected with the regional transmission grid and integrated with the Federal Columbia River power system. The High Dam Project or any other storage project in the Middle Snake could be so interconnected as to take advantage of the diversity of flow between the Columbia and the Snake, thus making full power use of the water resources.

(75) The High Dam Project would contribute about 12 percent of the flood control objective still to be realized under the Main Control Plan.

(76) The High Dam Project together with the existing and authorized downstream plans on the Columbia and Lower Snake would complete—except for channel improvements—the development of the 500-mile inland water transportation route.

(77) The economic feasibility of the authorized but unbuilt plants in the Main Control Plan especially the four Lower Snake Plants, is dependent upon storage development in the Middle Snake.

(78) Irrigation of large acreages in the Snake sub-basin is unlikely in the foreseeable future without financial assistance from some source. The High Dam Project or any other Federally-built and Federally-financed development could provide such financial assistance.

(79) The three dam scheme was planned, designed and engineered primarily to meet the present and future power needs of the area Applicant is under an obligation to serve.

(80) The three dam scheme, if built, in whole or in part, would occupy the reservoir area of the High Dam Project and would preclude its construction, except at prohibitive cost.

(81) Unless construction of new generating facilities in the Pacific Northwest is started soon, the region will be unable to meet its firm loads by about 1960; the region is already short of low cost power for potential new electro-process loads.

(82) The High Dam Project would contribute substantially to alleviating the regional power shortage and at the same time would meet power needs in the Applicant's service area, if such power were made available to the Applicant at attractive rates and with some assurance of necessary continuity.

(83) Present marketing policies in the Northwest, including as they do preference provisions for public

bodies and cooperatives, render publicly-developed power a somewhat less dependable source of long-term supply from the standpoint of the private power companies in the region, as compared to a supply from generation facilities installed and owned by such companies.

(84) Applicant's three dam plan would materially alleviate the power shortage in the area served by the Applicant and, to the extent that it would strengthen the east group of the Northwest Power Pool, would be of material benefit to the region.

(85) Applicant has investigated alternative sources of supply of power to supply normal growth needs of its service area and has satisfied itself that projects in the three dam scheme would supply needed power at a lower annual cost than any alternative source available at the present time. An Applicant is under no burden to prove that other sites could be developed so as to supply power at a lower annual cost than the site covered by its application, so long as the site it proposes to develop will produce power at an annual cost lower than its worth.

(86) The High Dam Project has widespread public support, particularly in the Pacific Northwest. However, an appreciable segment of the public in the Northwest and throughout the United States is opposed to government participation in any activities which investor-owned corporations are willing and able to carry on under governmental regulation which will protect the public interest adequately.

(87) Various members of Congress have demonstrated an continue to demonstrate interest in Federal development of the High Dam Project; however, despite the introduction on a number of sessions of the Congress of legislation which would authorize the construction of the High Dam Project, Congress has not, as yet, seen fit to authorize such construction.

(88) Flood control is a major objective of the Main Control Plan and either the 3.88 million acre-feet *of usable* storage capacity claimed for the High

Dam Project by its proponents or the 2.3 million acre-feet *effective* storage assigned to the High Dam Project by the Army Engineers would contribute substantially to this objective.

(89) The Applicant's three dam plan would provide one *million* acre-feet of usable storage capacity and such storage capacity would contribute substantially to the objectives of the Main Control Plan.

(90) The Corps of Engineers currently estimate the value of storage in the Middle Snake River to be in the order of $1 per acre-foot of effective storage. Hence, effective storage of the High Dam Project would have a value of $2,300,000, as compared with $1,000,000 for the three dam plan.

(91) The annual flood control benefits which could be conferred by either the three dam plan or the High Dam Project plan are so small in relation to the power benefits of either plan as to be virtually insignificant from a dollar standpoint.

(92) Selection of the three dam plan instead of the one dam plan would provide less flood control storage in the Middle Snake River. The Corps of Engineers, charged with responsibility for flood control planning in the Northwest has not recommended that the three dam plan be rejected for this reason but has shown that the difference in flood control storage between the two plans may be achieved successfully in other parts of the basin and that part of the Main Control Plan heretofore assigned to the High Dam Project thereby achieved.

(93) Because suitable alternatives may be found, the Applicant's three dam plan is reconcilable with the flood control objectives of the Main Control Plan and the comprehensive plan.

(94) An inland navigation route of about 500 miles from the mouth of the Columbia to Lime Point, Idaho, is a major objective of the Main Control Plan.

(95) As an integral part of the Main Control Plan, the High Dam Project would contribute to this objective by providing water releases essential to power

generation and, hence, affect the economic feasibility of authorized downstream projects (John Day and the 4 Lower Snake dams) whose pools would form parts of the proposed slack-water route on the Columbia and Lower Snake Rivers. Storage on the Clearwater, and other storage in the Middle Snake plus Brownlee is just as effective as the High Dam Project in producing downstream benefits at those projects.

(96) The High Dam Project would also provide releases to help maintain minimum flows of 13,000 cfs at Lime Point for open-river barge navigation between Lewiston and Lime Point, a distance of about 30 miles.

(97) The High Dam Project would also provide releases to reduce the need for channel dredging for deep draft navigation on the Lower Columbia below Bonneville.

(98) The reservoir pool of the High Dam Project which would extend about 93 miles through the Canyon, would afford access and low-cost transportation for the development of now relatively inaccessible mineral resources in the Canyon area.

(99) Applicant's proposed Brownlee pool would be about 39 Miles shorter than the High Dam pool, and, (if subject to wider and more frequent fluctuations) would be a less effective transportation medium insofar as navigation on the pool is concerned and would contribute little to the development of mineral resources in the Canyon.

(100) The Corps of Engineers has heretofore estimated annual navigation benefits of the High Dam pool at $75,000.

(101) The Corps of Engineers have assigned no navigation benefits to the Brownlee pool of the three dam plan.

(102) The dollar benefits to be derived from navigation on either the High Dam pool or the Brownlee pool are so small in relation to the other benefits of either plan as to be without any practical significance.

(103) The three dam plan would provide releases for barge navigation between Lewiston and Lime Point, and thus is fully in harmony with the navigation objectives of the Main Control Plan and the comprehensive plan. There has never been any assurance given that the High Dam Project would be operated as to confer the same benefits, and there is some evidence to the effect that navigation releases would be almost completely subordinated to power operations of the High Dam.

(104) Neither the High Dam Project nor the Applicant's three dam plan would physically supply water for irrigation.

(105) Federal development of the High Dam Project could provide power revenues to help finance proposed irrigation works in the Snake sub-basin, but Federal development of any project could similarly provide revenues which could be used in whatever fashion Congress would direct by statute.

(106) Applicant's three dam plan would provide no direct financial assistance to irrigation development. However, by providing a new source of power for irrigation pumping, the three dam plan could be regarded as providing important assistance to irrigation development.

(107) Under Federal Reclamation laws, Congress has, at times, applied power revenues from Federal projects to help finance irrigation development in the same drainage area.

(108) Bills to authorize Federal construction of the High Dam Project have invariably proposed use of power revenues to help finance irrigation of the Payette Unit of the Mountain Home Division.

(109) The High Dam Project is the only project of the Main Control Plan that lies in the Middle Snake drainage area, and, in the view of some of its proponents, is the only likely source of power revenues for irrigation development in the area.

(110) The High Dam Project could develop the unique recreational potential of the Hells Canyon reach of

the Snake River into an outstanding national recreation area.

(111) The cost of construction for the recreation facilities which have been proposed in conjunction with the High Dam Project has been estimated by the National Park Service as being approximately $1,000,000.

(112) The Idaho Power Company estimates it would spend approximately $100,000 in a recreational improvement program in connection with its three dam plan, an amount which is intended to provide facilities for visitors comparable to such facilities at other of its power plants and in the industry generally.

(113) The National Park Service estimates that the High Dam Project with its access roads, facilities and structures, would attract from 500,000 to 650,000 visitors a year, while Applicant's developments would attract about half as many.

(114) Federal recreational developments and the recreational facilities at privately-financed power installations may not be compared rationally, since the theories applicable to governmental development and to private development of such facilities have little in common. For this reason, any dollar comparison between the two proposals respecting either costs or benefits would be meaningless.

(115) Only preliminary studies of the effects on fish and wildlife of any of the proposals for development of the Middle Snake have been made.

(116) With ample allowance for all foreseeable upstream irrigation water uses, a dependable water supply can reasonably be expected for the efficient and economic operation of the High Dam Project during its payout period.

(117) As a fully integrated part of the existing Federal Northwest power system, the High Dam Project would be operated to produce maximum system prime power and salable firm power.

(118) The Corps of Army Engineers, the Bureau of Reclamation and Bonneville Power Administration have customarily used an incremental method of appraising the prime power contribution of projects proposed for addition to the Federal Northwest power system. Variations of this method have been used in appraising the prime power contribution of the High Dam Project.

(119) The incremental method as used by Federal planning agencies appears to be a suitable method of appraisal of projects to be added to a Federal system over a period of years.

(120) The "averaging method" or the "modified incremental method" is not generally used for planning purposes. This method, like most other methods of evaluation, is subject to the difficulties inherent in forecasting system conditions over a 50-year period. This method, however, has some usefulness in appraising the contributions of proposed projects.

(121) Under an arithmetical average of the results obtained by several expert witnesses who used an incremental method, the High Dam Project would contribute approximately 924 megawatts of prime power to the Federal system or about 1200 megawatts of salable firm power at 75 percent load factor over the payout period of the High Dam Project.

(122) Under the averaging method, according to the range of estimates in the record, the average prime power contribution of the High Dam Project would be 911 megawatts over the fifty-year payout period.

(123) The Commission Staff Brief summarizes all the evidence of record as to the potential prime power creditable to the High Dam Project and the three dam plan. It does not however, contain a recommendation as to which estimate is most acceptable for each plan.

(124) Sensible comparisons of the power contributions of the High Dam Project intergrated with the Federal system and the power contributions of the three

dam plan coordinated with the Federal system are not possible, since "integration" and "coordination" connote entirely different operations and thus must be expected to produce entirely different results.

(125) The Bonneville Power Administration has credited the High Dam Project with the full downstream power output attributable to its storage releases. The Corps of Engineers, in House Document 531, credited one-half of the benefit attributable to the storage releases from the High Dam Project to the authorized lower Snake River plants and one-half to the High Dam Project.

(126) Since one of the primary purposes of water storage in the Hells Canyon reach of the Snake River basin is to improve the ability of downstream plants to generate power, it would be unrealistic not to credit the upstream storage project with improved generation at downstream plants, and there is no proposal in the Commission Staff's Brief to disregard such downstream benefits.

(127) The Commission Staff's Brief (Table 3) shows an economic comparison of the alternative plans of development for the Hells Canyon reach of the Snake River based on the assumptions that 60 percent of downstream firm energy would be credited to such projects and that all the cost of supporting secondary energy would be assigned to the Hells Canyon reach projects. It also shows (Tables 4 and 5) a similar comparison based on allocating the cost of secondary energy to at-site projects in accordance to the amount of downstream firm energy assigned to projects in Hells Canyon reach of Snake River. There is, however, no proposal in the Staff Brief which adopts or accepts either of these analyses.

(128) If secondary energy is available in the Federal to projects in the Hells Canyon reach of Snake River. Northwest system less than eighty percent of the time, and is not salable, such surplus secondary energy as is used during refilling seasons to firm up the prime power output of Federal storage projects

should not be charged against the prime output of such projects.

(129) The secondary energy needed for the firming-up of the High Dam Project output is not available 80% of the time, so no charge against the High Dam Project should be made for the use of such secondary power.

(130) The Staff of the Commission has taken no position in its Brief on the question of whether or not it is proper to debit the prime power output of the High Dam Project by the amount of surplus secondary energy required to support its firm output.

(131) Bonneville Power Administration customarily uses salable firm power as the measure of the at-market system power contribution of the High Dam Project and of other projects in the Main Control Plan.

(132) In these proceedings the Staff of the Commission has made no recommendation as to whether it is proper to measure the at-market contribution of the High Dam Project in terms of prime power or in terms of dependable capacity plus a firm energy component, taking into account the matter of secondary energy.

(133) The Corps of Engineers, the Bonneville Power Administration and the Federal Power Commission, have evaluated the power output of the High Dam Project and other Main Control projects by comparing the cost thereof with the composite cost of alternative sources of supply and the amount that heavy industry could afford to pay for power. This is a theoretical value and is not an indication of the rates at which Federal power would be sold.

(134) In these proceedings the Staff of the Commission proposes that the High Dam Project output be evaluated by comparing the cost thereof with a value table presented by Witness Wing which conforms to the value described in (133) above.

(135) Some of the expert witnesses believed that the present regional hydro system will change over to

a steam-hydro system at some point during the 50-year payout period of the High Dam Project. This conclusion was based upon the assumption that regional requirements will grow steadily and the further prediction that all of the available low cost hydro sites will have been utilized before the end of the High Dam Project payout period. It would be presumptuous to attempt to refine such predictions to the point of fixing dates for such events and to conjure up the economic effect upon constructed projects in the Northwest system, and none of the expert witnesses attempted to do so.

(136) The High Dam Project is feasible from an engineering standpoint.

(137) The standards of design and construction for the High Dam Project would be essentially the same regardless of whether it was designed and constructed by engineers employed by a government agency or engineers employed by a non-governmental agency. A tendency toward inflexibility of government planning to be revised to meet actual construction conditions encountered during the building of government projects has been observed, and this is due to the fact that within the Federal planning staffs a more elaborate system of checks and balances is employed. This inflexibility tends to increase the capital costs of Federal developments.

(138) The transmission facilities proposed for the High Dam Project appear to be adequate for a fully integrated operation with the Federal Northwest system including flows of power to and from the project area.

(139) The transmission facilities proposed for the three dam plan are not designed for a fully integrated operation with the Federal Northwest Power system and there has never been any proposal or suggestion that the Applicant would engage in such an integrated operation.

(140) In its applications, Idaho Power Company has proposed interconnections with the Federal Northwest

Power system for the purpose of coordinating its operation of the three projects with the Northwest Power Pool. Such interconnection and coordination would be expected to be beneficial to the Applicant and to the Pool, and all of the power output analyses used in this proceeding have been based upon such coordinated operation.

(141) The capital cost estimated by the Bureau of Reclamation for the High Dam Project (exclusive of fish facilities) is $383,570,000, based on January 1952 prices. Since this estimate approximates the estimate furnished to the Congress by the Bureau in connection with proposed legislation, there is no basis for assuming that it was either "on the high side" or "on the low side".

(142) The cost of transmission facilities is estimated by the Bonneville Power Administration for the High Dam Project in the amount of $76.9 million and there is no scientific basis in the record for any assumption as to accuracy or lack of accuracy.

(143) The total capital cost (exclusive of fish facilities) estimated by the Bureau and the Bonneville Power Administration for the High Dam Project is $460.47 million. There is no comparable figure in this record for the three dam plan.

(144) The record affords no reasonable basis for consideration of the High Dam Project as a privately-financed and constructed project or the three dam plan as proposed by the Applicant as a Federally-financed and constructed project.

(145) A comparison of the two plans on the basis of Federal financing of each serves no useful purpose except for the determination of whether the three dams are superior to the high dam and whether they should be recommended for Federal development under Section 7(b) of the Federal Power Act.

(146) No useful purpose would be achieved by comparison of the capital cost estimates of the Federally-designed High Dam Project proposed for Federal construction and the capital cost estimates of the three dam plan under private construction.

(147) The annual cost at-market for the power output of the High Dam Project would be $28,567,000.

(148) For the High Dam Project the unit cost per kilowatt of salable firm power would be approximately $23.80 (see Findings (121) and (147)), and according to the record, this cost would not result in affecting the current Bonneville rate of $17.50, since all revenues and costs of the project would be pooled with the revenues and costs of the existing Bonneville Power Administration system.

(149) Comparing the unit cost of Federally-produced power marketed on the Federal system with privately-produced power intended primarily for marketing in a service area served by a private utility would produce misleading and deceptive results which would be of no value in objectively appraising the merits of the two proposals.

(150) The benefit to cost ratio of the High Dam Project would be about 1.83 to 1.0.

(151) The benefit to cost ratio of the three dam plan under theoretical Federal construction would be about 2.5 to 1.0 (see Findings (145) and (146)).

(152) Results of a comparison of the High Dam Project and the three dam plan on the basis of the cost of the increment added by the former as compared to the latter is deceptive and misleading unless both plans are considered with the same elements of annual cost and on the basis of the same power values. Even when such factors are utilized the result is of questionable value inasmuch as it contemplates the possibility of a choice between the two plans by the same construction agency and there has been no suggestion in this record that such a choice has ever been given any serious consideration.

(153) If the assumption were made of financing, construction and operation of either the High Dam or the three dam plan by the Federal Government, the High Dam Project in the one dam plan would make possible the production of the maximum amount of economical power and, according to the com-

parison made by the Staff, the value of the power increment which would be provided by the one dam plan over the three dam plan would be greater than its cost. (*Cf.* Staff Proposed Finding No. 20).

(154) A Federal project is economically justified if (1) the project benefits exceed the project costs, (2) each separable segment or purpose provides benefits at least equal to its costs, (3) the scale of development is such as to provide the maximum net benefits, and (4) there is no more economical means of accomplishing the same purpose. This is the doctrine expressed in the report of the Subcommittee on Benefits and Costs on "Proposed Practices for Economic Analysis of River Basin Projects". The test of economic feasibility of a project from a private construction standpoint applies to the salable product of such development and the actual revenue which may be reasonably expected from such development, since no revenue is derived by the private developer from non-power benefits conferred.

(155) The High Dam Project apparently would pay out its reinbursable costs with interest within a fifty-year period, i.e., amortization of the Federal investment allocated to power, together with costs of operation and maintenance.

(156) The financial and economic feasibility of Applicant's three dam plan is contingent upon revenues from its power output.

(157) About 60% of the national phosphate rock deposits are located, largely on Federal lands, in and around southeastern Idaho; there appears to be a growing regional and national need for high concentrate phosphate fertilizer.

(158) Greater utilization of these phosphate resources, of which a large part are furnace grade, might be fostered by an abundant supply of electric power at about the prevailing Federal wholesale rate.

(159) The High Dam Project by providing power at low rates, might be expected to stimulate large-scale

development of the phosphate resources and large-scale expansion of fertilizer production.

(160) The three dam plan would stimulate less phosphate development and less fertilizer production than the High Dam Project.

(161) Electro-process industries have contributed much to the increased industrialization of the Pacific Northwest and, apparently, constitute much of the region's future industrial potential.

(162) The High Dam Project, because of its high volume and low cost power output, might be expected to stimulate the expansion of electro-process industries to a greater extent than the three dam plan, including those which would utilize regional mineral resources.

(163) The High Dam Project, just as any large new source of low cost power might be expected to do, would help the Snake sub-basin by helping to:

(a) Industrialize, diversify and stabilize its still dominantly agricultural economy;

(b) Reduce its seasonal unemployment where such unemployment is attributable to lack of industrial labor requirements;

(c) Foster individual initiative and private business and industrial enterprise;

(d) Increase business and employment opportunities, broaden the tax base, and raise income levels and standards of living.

(164) The High Dam Project, just as any large new source of low cost power might be expected to do, would stimulate throughout the Pacific Northwest:

(a) Power-load development;

(b) Greater utilization of power in industry, agriculture, commerce, community and service activities;

(c) New business and employment opportunities;

(d) Expansion of production and productivity;

(e) Development of minerals and other materials important to the regional and national economy, and to national security;

(f) Strengthening of the regional and national economy.

(165) Because of completely different factors requiring different measurement it is not possible to say that the three dam plan is inferior to or superior to the High Dam Project or *vice versa* from an economic feasibility standpoint.

(166) Development of the Middle Stretch of the Snake River either by the United States itself or by a licensee of the United States under the terms and conditions of a limited license, would:

(a) Provide comprehensive multi-purpose development and utilization of the water resources of the Middle Snake and advance the comprehensive plan for the Columbia River Basin;

(b) Foster development of other resources in the Columbia River Basin including water resources the development of which by the United States itself has been authorized by Congress;

(c) Contribute substantially to the economic growth of the region;

(d) Add importantly to the strength of the national economy and security.

(167) If Federal development of the High Dam Project were carried out in accordance with provisions of the Bonneville Project Act (50 Stat. 732) it must be assumed that all of the public purposes set forth in that Act would be served.

(168) The three dam plan of the Applicant would not serve the public purposes and promote the public interest in the same way as the High Dam Project might under governmental auspices, but this is not

to say that the Applicant's plan would not serve public purposes and promote the public interest.

(169) Applicant's three dam plan would not impair the comprehensive plan for the Columbia Basin and would not result in permanent or temporary loss of any water resources.

(170) Applicant's three dam plan would not render infeasible any water resource developments by the United States which have been authorized by Congress.

(171) Full economic utilization of the water resources of the Middle Snake for power generation, flood control, navigation, recreation, irrigation and other purposes is a valid criterion of comprehensive multipurpose water resources development; development of the full head or utilization of the full flow alone for power purposes is not.

(172) No project proposed to supplant an economically feasible project in a comprehensive river-basin plan, if it would provide substantially lesser direct or or total benefits than the project to be supplanted, can qualify as being "best adapted to a comprehensive plan for improving a waterway or waterways", assuming both plans are ripe for proceeding, all financing, appropriation, authorization, or license authority or whatever preliminaries of this kind are necessary have been accomplished.

(173) The applications for license in this matter, as amended, are presumed to comply with the Commission's rules and regulations since they provide sufficient data for such understanding of the proposed projects as is necessary to apprise the parties to the proceeding of the plans and intentions of the Applicant. Certain drawings and revisions of drawings customarily are supplied by a licensee after a license is issued.

(174) Whatever deficiencies of the applications might be alleged have been cured by testimony of the Applicant's witnesses which testimony was fully subjected to cross-examination by all participating parties to the matter and by the Staff.

(175) Applicant has sustained its burden of proof with respect to the initial project of its three project development plan for the Middle Snake, and with respect to the over-all desirability of its plan of ultimate development when a market for all of the power appears more certain.

(176) Large power production, flood control, navigation and recreation benefits, the possibility of financial assistance for irrigation or other public purposes, the utilization of phosphate resources on public lands and the stimulation of industries dependent upon low cost power are public purposes which, in the aggregate, are factors to be taken into consideration in arriving at a judgment as to whether or not a recommendation to Congress of Federal development of these particular water resources should be submitted under Section 7(b).

(177) The likelihood or absence of likelihood of authorization of an appropriation for development by the United States of particular water resources are factors which, with propriety, may be taken into consideration in arriving at a decision as to whether or not to recommend under Section 7(b) development of water resources by the United States itself.

(178) Prompt development of water resources is one of the basic purposes of the Federal Power Act, and development by an otherwise qualified applicant may be delayed only when it is determined that substantial benefits would accrue to the nation by reason of development by the United States rather than a licensee, and that if such recommendation were made to the Congress there is reasonable likelihood that such recommendation would be favorably received, and acted upon, within a foreseeable time.

(179) Even assuming that substantial benefits would accrue to the people of the United States by Federal development of the Hells Canyon site on the Snake River, and that such benefits would exceed by a substantial amount those to be conferred by development under private auspices by a licensee, there is no reason to assume that if a recommendation of Fed-

eral development were to be made under Section 7(b) by the Commission, that development of these water resources would be undertaken by the United States within a foreseeable time.

(180) It was not contemplated that the Federal Power Commission should make recommendations to Congress under Section 7(b) when, in its judgment, the likelihood of the acceptance of those recommendations would be remote.

(181) Complete lack of development of water resources may be, in some instances, more detrimental to the public interest than underdevelopment. This is so especially when a qualified applicant for a license would be required to construct higher cost steam-electric stations to serve the requirements of its service area in lieu of the undeveloped hydroelectric sites which would produce power at a lower cost than could a steam-electric station.

(182) The facts in this record and the legislative history of the proposals for the High Dam Project (which is officially noticed) required the conclusion that a recommendation to the Congress under Section 7(b) in this case would be a completely useless act.

(183) The proposal for a High Dam Project in the Middle Snake River has been before the Congress in a number of past sessions, and full reports have been submitted which contain all of the pertinent engineering facts relative to such proposal. No essentially new facts with respect to the High Dam Project have been adduced in this record which should be submitted to the Congress in the event a recommendation were made under Section 7(b).

(184) Section 7(b) was designed to provide a means of submitting information to the Congress that it would not otherwise have access to. Since the Congress has had access to all of the pertinent facts relative to the High Dam proposal for a number of years and has held hearings on the various bills, it is evident that Section 7(b) is not applicable to the facts and circumstances involved herein.

Part III

Procedural Matters

This Part will be concerned with certain procedural questions which arose during the lengthy hearing on this matter, some of which appear to require initial rulings or reconsideration of past rulings by the Examiner. These matters are set forth in Appendix B of the Interveners' Reply Brief.

Motions Before the Commission

There are two motions by the Interveners which will in due course be ruled upon by the Commission in connection with its final decision on this matter. One of these, a Motion to Dismiss the applications in this matter, was filed on December 23, 1954. This motion was addressed to the Commission after the close of the hearing. It would not be appropriate for comment on this Motion to be made herein and it is noted merely for the Commission's convenience in reviewing the whole matter.

The second Motion concerns an appeal by the Interveners to the Commission requesting that the Examiner's ruling striking the testimony of a witness (Leland Olds) be reversed. The Commission deferred action on this Motion until the entire record of the proceeding was before it for decision. With the filing of this Report, this matter will be ripe for consideration, although it is doubtful what practical value this testimony might have if reinstated at this stage of the proceeding, even if it be assumed that the Examiner's action in striking it was error.

Motions Before the Examiner

The ruling on a Motion by Interveners to Strike Exhibit No. 106, presented by the Applicant, was deferred by the Examiner until he disposed of the whole matter so that the Applicant, the Interveners, and the Staff could,

if they chose, argue the matter in their briefs. While the Interveners note that this motion is still pending undetermined, and request a specific ruling on the Motion, there have been no further grounds for such Motion included in their brief nor any discussion or argument respecting the matter. In the circumstances, I have decided to leave the exhibit in its present status as a part of the record, largely because no new grounds have been advanced for changing its status. It should be noted that the Examiner is aware that there is much in the record which could be excised now on review, if any useful purpose would be served thereby. Exhibit 106 and the testimony which accompanied it have not been relied upon for any purpose by any of the parties or by the Staff. It has played no part in the formulation of this Report. Not having been used or relied upon by any party, it would appear to be in a sort of quasi-judicial Limbo. Motion denied.

Certain exhibits (Exhibits 107-115) were submitted by the Applicant during the course of the hearing which related to designs for impervious earth core dams. They were received in evidence over the objection of the Interveners who objected on the grounds that the exhibits were irrelevant and immaterial, inasmuch as the Applicant had not proposed to build impervious earth core dams and no one else had, and that therefore the documents were not entitled to admission in evidence. Again, here are exhibits which have been by-passed by everyone in the proceeding. When the exhibits were received it was early in the hearing, and no one could have forecast the course of the matter at that time. Under Section 10(a) of the Act, the Commission can "require the modification of any project and of the plans and specifications of the project works before approval". It was not known at that time what recommendations might be made concerning design and material changes by the Commission's staff experts.

There is much in the record which, in the final analysis, has proved to have little or no materiality. To study

selected examples of this class of evidence at this stage would appear to be a most unrewarding activity. Motion denied.

Exceptions to Adverse Evidentiary Rulings

Appendix B of the Interveners' Reply Brief contains a notation of seven groups of adverse rulings to which "we also press exceptions". It is proper for the Interveners to note these matters to protect their rights in this fashion, although in view of this Report, certain of the adverse rulings of the Examiner may not appear to be prejudicial to the position of the Interveners.

Each of the groups of rulings have been carefully reviewed so that if it is seen that any error had been committed which should be corrected herein, such corrective action may be taken *sua sponte*. Some of the transcript page references do not appear to relate to any particular rulings but rather to statements of the Examiner which might appear to reflect a prejudicial state of mind at the particular time.

It would be remarkable indeed if, on review of a 20,000 page record, numerous errors by the Examiner could not be found, or inconsistencies in rulings shown, which individually would appear to be lacking in fairness, and which would provide ammunition for claims that important rights of the parties have been disregarded. Doubtless, allegations of schoenobatic conduct by the Examiner will be made in the course of the proceedings which follows the issuance of this Report and the findings contained therein. No reviewing authority will be expected to read the whole transcript in minute detail, but if this were done, it might appear that many of the rulings complained of were motivated by an overwhelming desire of the undersigned Hearing Examiner to prevent the hearing from turning into an ideological Donnybrook Fair, which would have been inconsistent with the traditional standards of decorum

applicable to judicial proceedings which are applicable, as well, to administrative proceedings.

Status of Interveners

Various orders have been issued by the Commission permitting certain parties to intervene in these proceedings. These interveners are as follows:

1. Lewis County Public Utility District
   Public Utility District No. 1 of Klickitat County
   Benton County Public Utility District
   Clark County Public Utility District
   Public Utility District No. 1 of Skamania County
   Public Utility District No. 2 of Pacific County
   Public Utility District No. 3 of Mason County
   Franklin County Public Utility District No. 1
2. National Hells Canyon Association (comprised of the following organizations):

   Oregon State Federation of Labor
   Washington Public Utility Districts Association
   Idaho Oregon Hell's Canyon Association
   Oregon State Grange
   Montana Rural Electric Cooperative Association "State Wide"
   Idaho Rural Electric Cooperative, Inc.
   Washington State Grange
   The Columbia River Development League
   Washington State Federation of Labor
   Oregon State Industrial Union Council
   Northwest Public Power Association
   Oregon Farmers Union
   Idaho State Federation of Labor
3. The State of Washington
4. Albert C. Ullman, Byron C. Brinton and Clinton Haight, Jr. (Hells Canyon Development Association)
5. Idaho Oregon Hells Canyon Association
6. Gus Norwood, the Northwest Public Power Association

7. Mountain Home Reclamation Chapter, John Glasby President
8. Joseph Chamber of Commerce, Joseph, Oregon
9. Washington State Grange
10. Snake River Free Enterprise Association
11. California Pacific Utilities Company
12. Independent Engineers for Private Enterprise
13. National Rural Electric Cooperative Association
14. Butler Ore Company

In each of the orders permitting intervention it was found by the Commission that "Participation of the above-named petitioner in these proceedings *may* be in the public interest" (Emphasis added).

The qualified finding set forth above suggests that further consideration of the status of these parties as interveners is contemplated in connection with the Commission's final decision in this matter.

The granting or denying of intervention is, of course, beyond the scope of the authority given to the Examiner by the Commission. However, it would appear appropriate to state briefly the nature of the participation of these various parties so that consideration may be given to the relationship of such participation to the allegations of the petitioner respecting the possible effect upon its interest by any order issued by the Commission in these matters. Such consideration would determine finally the elegibility of each of these parties to remain in the status of intervener during further procedural steps remaining in these dockets, such as the filing of exceptions, participation in oral argument, if such is granted, and applications for rehearing.

Interveners Nos. 1 and 2 participated fully in the hearing in Washington, D. C., presented a number of witnesses and filed briefs.

Intervener No. 3's participation consisted of the presentation of a single technical witness, several exhibits, and the filing of a brief which reiterates much of the opinion testimony of that witness on a very limited aspect of the proceeding.

Interveners Nos. 4, 7, 8, 9, 10, and 11 participated to some extent in the non-technical sessions of the hearing in Baker, Oregon, and Boise, Idaho, in July 1952, but did not participate in any way in the Washington, D. C., sessions. None of these interveners filed briefs.

Interveners Nos. 5, 6, and 9 are "double interveners" inasmuch as they are covered by two separate orders permitting intervention. Such double status would appear to lack any advantage from either the standpoint of the parties or the Commission. These parties participated to some extent in the field hearings in 1952, but did not participate individually after their joinder with Intervener No. 2.

Intervener No. 12 participated in the Baker, Oregon sessions of the hearing only and filed a brief.

Intervener No. 13 presented a single "position" witness in one of the sessions of the Washington, D. C., hearings but did not present any technical witnesses, participate in cross-examination, nor file a separate brief. The briefs by Interveners Nos. 1 and 2 include Intervener No. 13.

Intervener No. 14 did not enter an appearance, presented no evidence, and filed no brief.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 1971
Project No. 2132
Project No. 2133

In the Matter of

IDAHO POWER COMPANY

Presiding Examiner's Order Issuing License and Denying Applications Without Prejudice

Upon consideration of the entire record in this matter, including the reports of the Federal agencies and the briefs filed by the parties to this matter and the Staff of the Commission, and upon the findings and conclusions set forth in the foregoing Decision in this matter which are hereby adopted as a part hereof,

It is *ordered,* subject to review by the Commission:

(A) This license is issued to Idaho Power Company under Section 4(e) of the Federal Power Act for a period of fifty (50) years, effective as of the first day of the month in which the acknowledgment of acceptance hereof is filed with the Commission, for the construction, operation, and maintenance of the proposed Brownlee Project, No. 2133, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license is also subject to the following terms and conditions set forth as Articles 1 through 27 and which are the same as the terms and conditions set forth in Form L-6, December 15, 1953, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and

Lands of the United States", and subject to the special conditions set forth herein as Articles 28 through 43:

Article 1. The entire project, as heretofore described, shall be subject to all the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided,* however, that if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval amended, supplemental, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. Said project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works under the license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in the project works or divergence from such approved exhibits may be made if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission,

which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health, or property.

Article 4. The construction, operation, and maintenance of the project and any work incident to additions or alterations, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall furnish to said representative such information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow him and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties.

Article 5. Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the maps, plans, specifications, and statements approved by

the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 6. For the purpose of determining the stage and flow of the stream or streams from which water is to be diverted for the operation of the project works, the amount of water held in and withdrawn from storage, and the effective head on the turbines, the Licensee shall install and thereafter maintain such gages and stream-gaging stations as the Commission may deem necessary and best adapted to the requirements; and shall provide for the required readings of such gages and for the adequate rating of such stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission and may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of said project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient record of the foregoing de-

terminations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 7. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreation purposes, including fishing and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may, in appropriate circumstances, be subject to payment of rent to the Licensee in a reasonable amount: Provided, that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property and *Provided further,* that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities.

Article 8. In the construction and maintenance of the project, the location and standards of roads and trails, and other land uses, including the location and condition of quarries, borrow pits, spoil disposal areas, and sanitary facilities, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 9. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the license, or in the maintenance of the project, such material shall be removed and deposited so it will not interfere with navigation, and will be to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 10. In the construction and maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines, and telegraph, telephone, and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

Article 11. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction. None of the provisions of this article is intended to relieve the Licensee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

Article 12. The Licensee shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission line; shall cut and remove all dead or leaning trees which might fall in contact with the transmission line; and shall take such other precautions against fire as may be re-

quired by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 13. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works or in the clearing of said lands shall be paid for in accordance with the requirements of and at the current stumpage rates applicable to the sale of similar timber by the agency of the United States having jurisdiction over said lands; and all slash and debris resulting from the cutting or destruction of such timber shall be disposed of as the officer of such agency may direct.

Article 14. The Licensee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the agency of the United States concerned, to prevent, make advanced preparations for suppression, and suppress fires on lands occupied under the license.

Article 15. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete and maintain such navigation facilities.

Article 16. The Licensee shall furnish free of cost to the United States power for the operation and maintenance of navigation facilities at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

Article 17. The operation of any navigation facilities, which may be constructed as a part of

or in connection with any dam or diversion structure constituting a part of the project works, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the construction, maintenance, and operation by the Licensee, at its own expense, of such lights and signals as may be directed by the Secretary of the Army.

Article 18. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

Article 19. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit or body of water, natural or artificial, used by the Licensee

in the operation of the project works covered by the license, or to the use by said parties of water for sanitary and domestic purposes from any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 20. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 21. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across the project lands, conduits, chutes, ditches, railroads, trails, telephone and power lines, and other means of transportation and communication not inconsistent with the enjoyment of said lands by the Licensee for the purposes stated in the license. This article shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 22. There is reserved to the appropriate department or agency of the United States, or of the State or county involved, the right to take over, maintain, and supervise the use of any project road as a public road after construction of the project works is completed.

Article 23. The actual legitimate original cost of the original project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Act and the Commission's rules and regulations thereunder.

Article 24. After the first twenty (20) years of operation of the project under the license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves, pursuant to Section 10(d) of the Act; one-half of the project surplus earnings, if any, accumulated after the first twenty years of operation under the license, in excess of six (6) percent per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year, provided that, if and to the extent that there is a deficiency of project earnings below six (6) percent per annum for any fiscal year or years after the first twenty years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained therein until further order of the Commission.

Article 25. No lease of the project or part thereof whereby the lessee is granted the exclusive occupancy, possession, or use of project works for purposes of generating, transmitting, or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of the license, of the Act, and of the rules and regulations of the Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee: *Provided*, that the provisions of this article shall not apply to parts of the project or project works which may be usd by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate

consideration for such joint use, or to leases of land while not required for purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works, the leasing of which will not interfere with the usefulness of efficient operation of the project by the Licensee for such purposes.

Article 26. The Licensee, its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties necessary or useful to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission; *Provided*, that a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. In the event the project is taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and assigns will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for payment and discharge, of all liens or incumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: *Provided*, that the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or in-

efficient for further service due to wear and tear, or to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to or right of user in any of such project property than was necessary to acquire for its own purposes as Licensee.

Article 27. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

Article 28. The Licensee shall commence construction of the Brownlee Project within one year of the effective date of this license, and shall thereafter in good faith and with due diligence prosecute such construction; and shall complete the project in 36 months.

Article 29. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L, and Licensee shall not begin construction of the project works until the Commission approves the exhibit.

Article 30. The final design of the spillway at the dam of the proposed project shall be based on model tests.

Article 31. The Licensee shall, within one year from the date of commencement of construction of the project, file with the Commission Exhibits F and K in accordance with the rules and regulations of the Commission.

Article 32. The Licensee shall, prior to flooding, clear all lands in the bottom and margin of the reservoir up to high water level, and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die during the operation of the project shall be removed. The clearing of the lands and the dis-

posal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 33. The Licensee shall cooperate with the Smithsonian Institution in the salvage of such archeological values as may be affected by the construction of the Brownlee Project, if any, and the Licensee shall, upon request of that Institution, and further order of the Commission, contribute such sums, not to exceed $12,000, as may be required for archeological excavations.

Article 34. The Licensee shall make available to the Secretary of the Interior, upon his request and further order of the Commission, a sum up to $250,000 for use by the Fish and Wildlife Service to carry out detailed studies of the extent and character of the fishery resources of the project area and to devise means and measures for mitigating losses to that resource.

Article 35. The Licensee shall construct, maintain and operate or shall arrange for the construction, maintenance and operation of such fish ladders, fish traps or other fish handling facilities or fish protective devices and provide fish hatchery facilities for the purpose of conserving the fishery resources and comply with reasonable modifications of the project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon its own motion or upon the recommendations of the Secretary of the Interior and the conservation agencies of the States of Idaho and Oregon.

Article 36. The Licensee shall negotiate with the Fish and Game Commission of the State of Oregon and Department of Fish and Game of the State of Idaho with respect to the amount the Licensee shall pay each year to defray a reasonable portion of the operation and maintenance cost of fishery facilities to be provided under the license. Should the Licensee and the State agencies fail to agree on the amount to be paid by the Licensee for such purpose, the Commission re-

serves the right to determine the amount of this annual payment after notice and opportunity for hearing.

Article 37. The Licensee shall negotiate with the Game Commission of the State of Oregon and the Department of Fish and Game of the State of Idaho with respect to the acquisition by the Licensee for the State agencies of island and marsh areas along the Snake River for development as substitutes for waterfowl nesting areas to be lost by reservoir inundation. Should the Licensee and the State agencies fail to agree on the acquisition of such lands, the Commission reserves the right to make a final determination in this matter after notice and opportunity for hearing.

Article 38. The Licensee shall make available to the Secretary of the Interior, upon his request and further order of the Commission, a sum up to $60,000 for the preparation by the National Park Service in cooperation with Licensee, of a recreation master plan.

Article 39. At such time as the Commission may direct and to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing, the Licensee shall install additional generating units at the Brownlee Project.

Article 40. In the interest of flood control the Licensee shall operate the project as follows:

(a) The total live storage space of about 1,000,000 acre-feet between elevation 1976 and elevation 2077 mean sea level will be made available for flood control use if and as required.

(b) The reservoir level elevation will be no higher than elevation 2034 by 1 March of each year to provide about 500,000 acre-feet of storage space for flood control use at that time each year.

(c) Additional storage space required up to 500,000 acre-feet will be obtained by evacu-

ation as necessary during the month of March in a manner to insure availability on or before 1 April of the total storage capacity needed for flood control, as estimated by the Corps of Engineers. This space will be retained until capture of flood flows is requested by the Corps of Engineers, subject to possible involuntary storage as may be required due to temporary inflows in excess of outlet capacity, or until refilling in the interest of power output is authorized by the Corps of Engineers. In the event of involuntary storage, full capacity will be regained as soon as possible.

(d) During the flood storage period controlled outflows will be as requested by the Corps of Engineers. Daily outflows will be as requested by the Corps of Engineers. Daily outflows of 30,000 acre-feet, as a minimum, will be permitted when required for power purposes.

(e) In order to achieve the above operation for flood control, discharge capacity of 65,000 c.f.s. at minimum pool, elevation 1976, including gated outlet capacity plus one-half of the ultimate turbine capacity, is to be provided by the Licensee.

(f) The above conditions will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

Article 41. The project shall be operated in the interest of navigation to maintain 13,000 c.f.s. flow in the Snake River at Lime Point (river mile 172) a minimum of 95% of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 c.f.s. will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 c.f.s. at Johnson's Bar, at which point the maximum varia-

tion in river stage will not exceed one foot per hour. These conditions will be subject to review from time to time as requested by either party.

Article 42. The Licensee shall pay the United States the following annual charges for the purpose of reimbursing it for the costs of administration of Part I of the Act: One (1) cent per horsepower on the authorized installed capacity (556,000 horsepower) plus two and one-half (2½) cents per 1000 kilowatt-hours of gross energy generated by the project during the calendar year for which charge is made. The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.

Article 43. The Commission expressly reserves the right to determine at a later date the question of what transmission lines and appurtenant facilities shall be covered in this license and included as part of the project works.

(C) The exhibits described in finding (55) above are approved as part of the license for the project.

(D) This order shall become final thirty (30) days from the date of its adoption and issuance by the Commission unless application for rehearing shall be filed as provided by Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within sixty (60) days from the date of issuance of the order of the Commission adopting this order.

(E) The applications filed herein for Project Nos. 1971 and 2132 are denied, without prejudice.

WILLIAM J. COSTELLO
Presiding Examiner

Washington, D. C.

Filed: May 6, 1955

Issued: May 6, 1955

APPENDIX I

Section 4(e) To issue licenses to citizens of the United States or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[4] *Provided further,* That no license affecting

---

[4] The act of Mar. 3, 1921 (41 Stat. 1353), reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as now constituted of any national park or national monument shall be granted or made without specific authority of Congress, and so much of the Act of Congress approved June 10, 1920, entitled 'An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes', approved June 10, 1920, as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed." [See Appendix.]

the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission:

* * * * * * * *

Section 7(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067, 49 Stat. 842; 16 U.S.C. 800]

* * * * * * * *

Section 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require. [41 Stat. 1068; 16 U.S.C. 802]

* * * * * * * *

Section 10. [*As amended August 26, 1935.*] All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission

will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * * * *

Section 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof. [41 Stat. 1071; 16 U.S.C. 806]

* * * * * * *

Section 23(b). It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance

with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws. [41 Stat. 1075, 49 Stat. 846; 16 U.S.C. 816, 817]

• • • • • • • •

Section 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein. [41 Stat. 1077; 16 U.S.C. 821]

• • • • • • • •

Extract from:

UNITED STATES CODE ANNOTATED

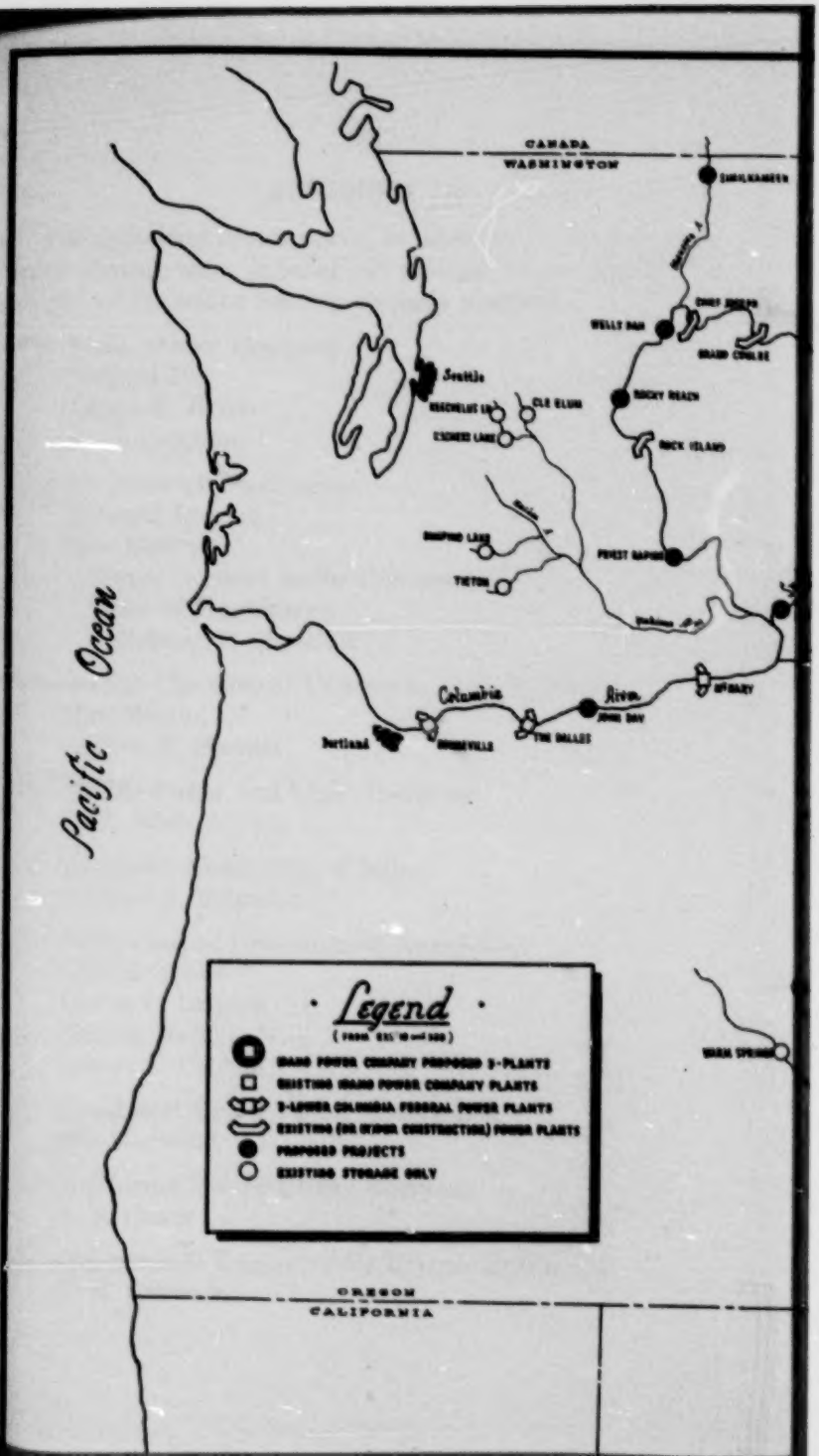
Title 43

Chapter 12A—Boulder Canyon Project

§ 617e • • • *limitation on authority of Federal Power Commission.*

• • • • • • • •

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under the Federal Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until sections 617-617t of this title shall become effective as provided in section 617c of this title. Dec. 21, 1928, c. 42, § 6, 45 Stat. 1061; June 10, 1920, c. 285, § 320, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 863.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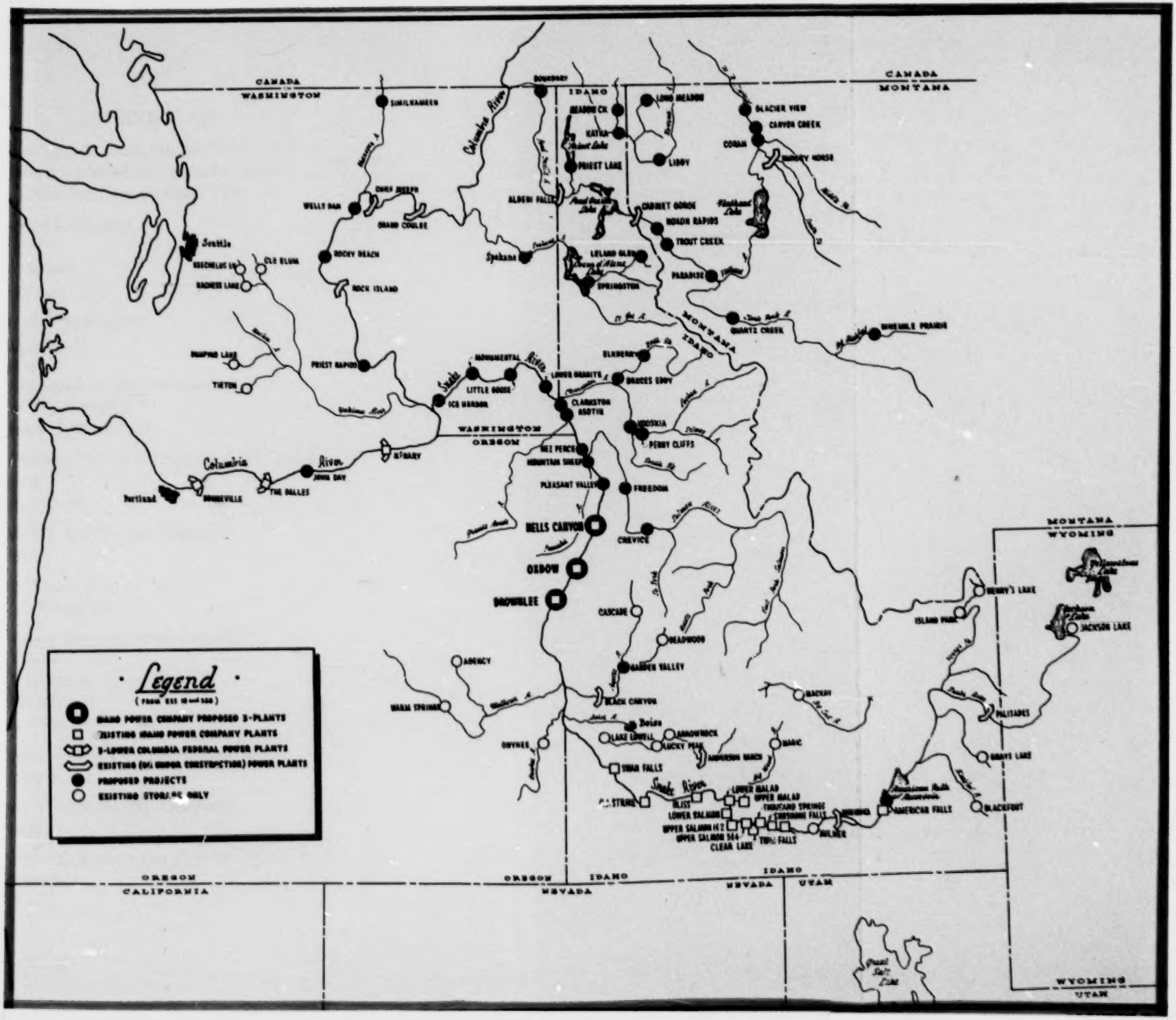
Pacific Ocean
Seattle
Columbia
River
Portland
OREGON
CALIFORNIA
Legend
IDAHO POWER COMPANY PROPOSED 3-PLANTS
EXISTING IDAHO POWER COMPANY PLANTS
3-LOWER COLUMBIA FEDERAL POWER PLANTS
PROPOSED PROJECTS
EXISTING STORAGE ONLY


CANADA
WASHINGTON
IDAHO
CANADA
MONTANA
BOUNDARY
SIMILKAMEEN
Columbia River
Kootenai River
LONG BEACH
GLACIER VIEW
CANYON CREEK
COEUR
MURRAY HORSE
LIBBY
PRIEST LAKE
ALBENI FALLS
CABINET GORGE
NOXON RAPIDS
TROUT CREEK
WELLS DAM
CHIEF JOSEPH
GRAND COULEE
ROCKY REACH
ROCK ISLAND
Seattle
WENATCHEE
CLE ELUM
YAKIMA
Spokane
LELAND GLEN
SPRINGSTON
PARADISE
QUARTZ CREEK
WHEELER PRAIRIE
MONTANA
IDAHO
PRIEST RAPIDS
WANAPUM LAKE
YAKIMA
TIETON
MONUMENTAL
LITTLE GOOSE
ICE HARBOR
LOWER GRANITE
ELKHORN
BRUCES EDDY
CLARKSTON
ASOTIN
Snake
Palouse
Tucannon
WASHINGTON
OREGON
WALLA WALLA
NEZ PERCE
MOUNTAIN SHEEP
PLEASANT VALLEY
FREEDOM
PERRY CLIFFS
Columbia River
JOHN DAY
THE DALLES
Portland
BONNEVILLE
HELLS CANYON
CREVICE
OXBOW
BROWNLEE
CASCADE
DEADWOOD
ADEMY
WARREN VALLEY
BEACH CANYON
Boise
LAKE LOWELL
ARROWROCK
LUCKY PEAK
ANDERSON RANCH
MAGIC
TWIN FALLS
Snake River
BLISS
LOWER SALMON
UPPER SALMON #2
UPPER SALMON #4
CLEAR LAKE
STERLING
LOWER MALAD
UPPER MALAD
THOUSAND SPRINGS
MINIDOKA
PALISADES
GRAYS LAKE
BLACKFOOT
AMERICAN FALLS
MILNER
TWIN FALLS
MONTANA
WYOMING
HENRY'S LAKE
ISLAND PARK
JACKSON LAKE
OREGON
CALIFORNIA
OREGON
NEVADA
IDAHO
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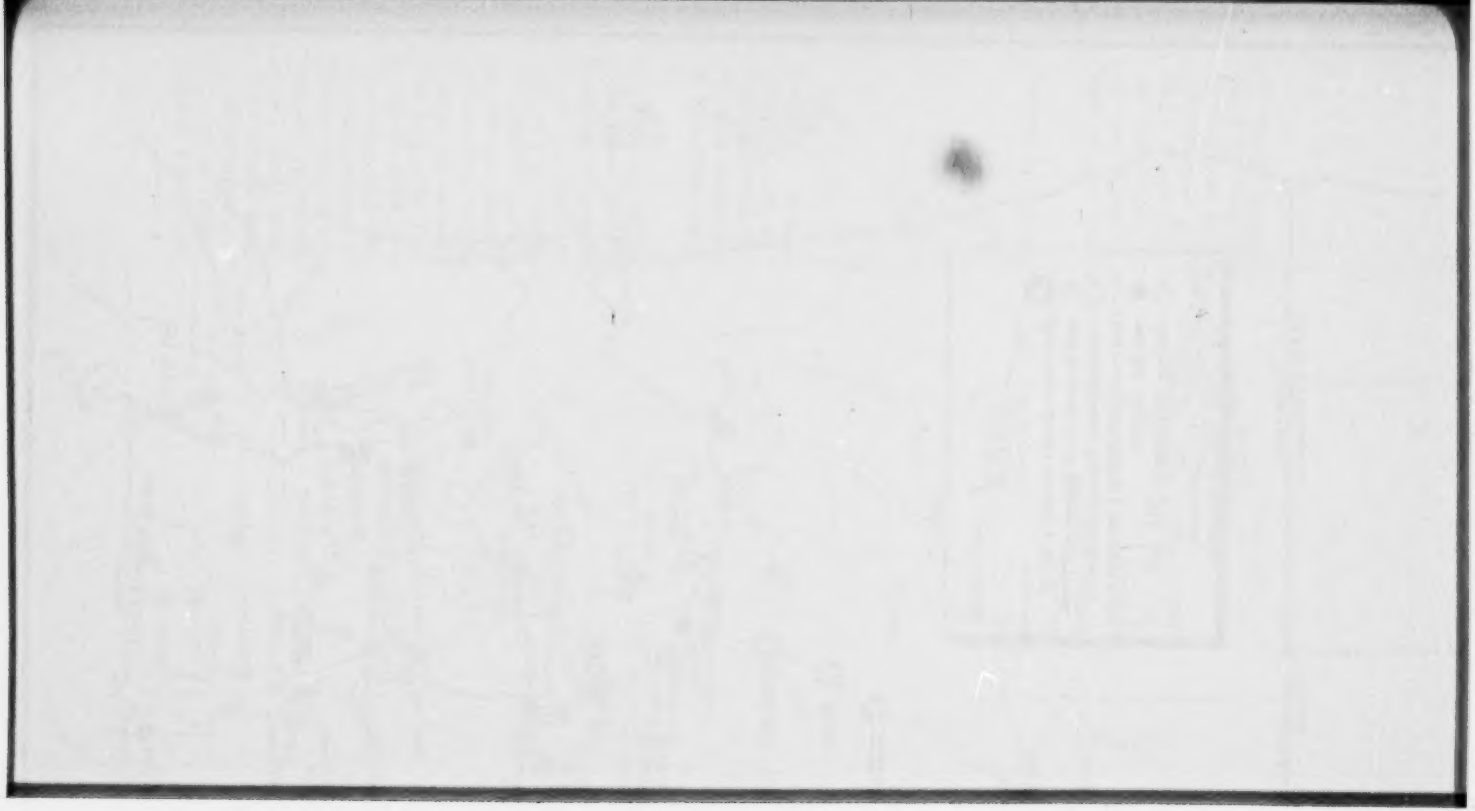

APPENDIX III

The following appearances, in addition to those heretofore shown, were entered at various times during the course of the public hearing on these matters:

For Idaho Power Company
Clifford Fix
James K. Bruce
M. O. Leighton

For the State of Washington
Bernard Lonctot
Don Eastvold
Power Advisor to the Governor,
State of Washington
Holland H. Houston

For Joseph Chamber of Commerce, Joseph, Oregon
Max Wilson
Clinton E. Sincleir

For Pacific Power and Light Company
A. E. Blair

For American Federation of Labor
Andrew J. Biemiller

For Hells Canyon Development Association
Lyle R. Wolff
Byron C. Brinton
Clinton Haight, Jr.
Albert C. Ullman

For Northwest Public Power Association
Gus Norwood

For California Pacific Utility Company
A. S. Grant

For Independent Engineers for Private Enterprise
F. R. Schanck

For a Group of Citizens of Nyssa, Oregon
John M. Graham

For Snake River Free Enterprise Association of Baker, Oregon
David C. Silven

For Oregon Game Commission
C. J. Campbell

For National Hells Canyon Association and Lewis County P.U.D., et al.
C. Gerard Davidson
L. A. Nikoloric
Theodore A. Miller

For Idaho Oregon Hells Canyon Association
George A. Greenfield
G. H. R. Taylor
Lloyd Tupling

For National Rural Electric Cooperative Association
Lawrence Potamkin

For American Farm Bureau Federation
Matt Triggs

For Butler Ore Company
Pierce Butler, III

For Washington State Grange
Edgar J. Wright

For Mountain Home Reclamation Chapter
John Glasby
Robert F. McLaughlin

For Secretary of the Interior
Howard R. Stinson
Joseph B. Brooks

For Oregon Region, Congress of Industrial Organizations
Chester C. Dustin

For Steck Motor Company and Other Enterprises
Kenneth Steck

For Snake River Free Enterprise Association of Weiser, Idaho
Gene E. Stanford

For Lake Reservoir Company and Various Other Companies
James A. McClure

For Oregon Fish Commission
Robert W. Schoning

For the American Public Power Association
Alex Radin

For the Staff of the Federal Power Commission
Willard W. Gatchell
Joseph E. Hayden
Joseph B. Hobbs

For Certain Petitioners Requesting That the Hells Canyon Dam Site Be Reserved
Mrs. Gracie Pfost
Member of Congress
First District, Idaho

For the Farmers Education and Cooperative Union
Robert G. Lewis

Staff Counsel's Technical Aides and Consultants
Joseph J. A. Jessel
Ralph E. Coomes
Hollis M. Orem
Wilfrid A. Froggatt
Lesher Wing
Alan J. Meadowcroft
Thomas M. Crum
J. M. Shepley
C. B. Walton
Carl S. Marlatt

Office - Supreme Court, U
FILED
FEB 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

MOTION OF IDAHO POWER COMPANY TO CORRECT AND AMEND TITLE AND CAPTION

R. P. PARRY
Fidelity National Bank
Twin Falls, Idaho

A. C. INMAN
1220 Idaho Street
Boise, Idaho

Attorneys for
Idaho Power Company

February 18, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

MOTION OF IDAHO POWER COMPANY TO CORRECT AND AMEND TITLE AND CAPTION

Idaho Power Company, a corporation (hereinafter called "the Company"), hereby respectfully moves this Honorable Court for a rule or order to correct and amend the title and caption of this proceeding, to show "IDAHO POWER COMPANY" as a party respondent, upon the following grounds and for these reasons:

I

In the Court of Appeals for the District of Columbia Circuit, from whose decision this appeal is taken, the parties were aligned with Petitioners herein, as Petitioners there, on one side, and the Federal Power Commission as Respondent, and Idaho Power Company as Intervenor, on the other side.

As certified to this Court by the Clerk of the Court of Appeals, the full and correct title of this action in the Court below was:

Nos. 12988 and 13160

NATIONAL HELLS CANYON ASSOCIATION, INC. ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*
IDAHO POWER COMPANY, *Intervenor*

II

Idaho Power Company is the real party in interest in these proceedings. They were initiated by the applications for license filed by the Company before the Federal Power Commission and, after more than a year of hearings, license for a 3-dam hydroelectric development on the Snake River was issued to the Company on August 4, 1955, and was accepted by the Company, in accordance with the provisions of said license and the Federal Power Act, on August 9, 1955. These proceedings are an attempt to review the order issuing that license. The Court of Appeals affirmed the order granting the license (237 F. 2d 777).

III

Proceedings to stay the said license were initiated in this Court before the Honorable Mr. Justice Black on July 10, 1956, after stay had been denied both by the Federal Power Commission and by the Court of Appeals. The order issued by Mr. Justice Black on August 15, 1956, is entitled:

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL., *Petitioners*, v. FEDERAL POWER COMMISSION and IDAHO POWER COMPANY.

This order denied a stay conditioned upon the Company filing an Indemnity Agreement, Waiver and Release and an Indemnity Bond, which had been filed prior to the signing of said order.

IV

Because of the time limitation in its license, and as a result of such refusals to stay the license by both the Court of Appeals and this Court, the Company has proceeded with construction of the Brownlee Dam on the Snake River, one of the units of the licensed project, and this development is now about one-third completed.

V

In addition to the foregoing, the Company respectfully asserts:

(a) The Company was a full party, and a real party in interest, in the case below, and is such in the proceedings here; that its status and rights as a party in this proceeding are determined by and are a matter of law, and are not determined, nor can they be determined, by Petitioners, by the form and style of the

title or caption of their Petition for Certiorari, or by Petitioners' service or failure to serve such Petition upon the Company; that the determination of who is or is not a party in a proceeding in this Honorable Court should not and does not depend upon the discretion, election or tactical considerations of the filing party seeking review.

(b) The Company's liability under said Indemnity Agreement, Waiver and Release and said Indemnity Bond to the United States, on file in this Honorable Court, depends upon the validity of the Company's Federal Power Commission license, and its affirmance in the Court below, which are the sole issues before this Honorable Court on the Petition for Certiorari in this proceeding.

(c) The denial of full party status to the Company in this proceeding, which determines the validity of its license, and its liabilities as hereinabove referred to, would deny to the Company its day in this Honorable Court to defend its substantial rights as licensee, contractor and obligor of the United States, and any judgment altering these rights would injuriously affect its interests, and would be a denial to the Company of due process of law under the Fifth Amendment to the Constitution of the United States.

WHEREFORE, the Company respectfully prays that this Court issue its rule or order correcting and amending the title and caption of this proceeding by

showing the Idaho Power Company as one of the respondents.

Respectfully submitted,

R. P. PARRY
Fidelity National Bank
Twin Falls, Idaho

A. C. INMAN
1220 Idaho Street
Boise, Idaho

Attorneys for
Idaho Power Company

February 18, 1957

Office - Supreme Court, U.S.
FILED
FEB 28 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC. ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITIONERS' ANSWER TO MOTION OF IDAHO POWER COMPANY "TO CORRECT AND AMEND TITLE AND CAPTION"

EVELYN N. COOPER
LUCIEN HILMER
Counsel for Petitioners
1025 Connecticut Ave., N.W.
Washington 6, D. C.

February 28, 1957.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC. ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITIONERS' ANSWER TO MOTION OF IDAHO POWER COMPANY "TO CORRECT AND AMEND TITLE AND CAPTION"

Petitioners respectfully respond to the motion of Idaho Power Company as follows:

1. Petitioners do not contend that Idaho Power Company should not be heard in this proceeding. The only question is whether the Company should proceed in accordance with Rule 42 of the Rules of this Court, or whether it should be accorded rights or privileges beyond those provided therein. For the reasons set forth below, petitioners oppose the motion, but would not

object to the Company's participation in the above-captioned proceeding as *amicus curiae.*

2. Despite its title, the motion of Idaho Power Company is a request that it be made a party respondent, and as such, is addressed to this Court's discretion.

> *P.S. Guss, d/b/a Photo Sound Products Manufacturing Company* v. *Utah Labor Relations Board,* No. 280, October Term, 1956, decided December 17, 1956;
> *Federal Power Commission* v. *State of Oregon, et al.,* 348 U.S. 868 (1954).

In both of these cases, the motion of an interested third person to be made a party respondent was denied. In the *Guss* case, leave was granted, however, to file a brief as *amicus curiae.*

3. Petitioners named the Federal Power Commission alone as party respondent, because their controversy in this proceeding is with the Commission. The legal questions on which petitioners seek review are whether the Commission, in granting Idaho Power Company a license to construct a hydroelectric project, and whether the Court below, in affirming the Commission action, improperly interpreted and applied fundamental provisions of the Federal Power Act and certain provisions of the Administrative Procedure Act.

4. Idaho Power Company has shown no necessity or justification for being made a party respondent. Its participation as an intervenor below does not entitle it, as a matter of law, to be a party in this Court; nor does its interest in the outcome of this proceeding afford it such a right. (See e.g., *National Labor Relations Board* v. *Gamble Enterprises,* 345 U.S. 117 (1953)).

5. The fact that Idaho Power Company has proceeded with construction under the contested license gives it no special right to be a party. The Company asserts, without offering substantiating facts, that one of the three dams covered by the license is "about one-third completed". Such construction, regardless of the extent, was undertaken by the Company as a "calculated risk".[1] The Company was under no legal compulsion. On the contrary, it started construction work nine months before the end of the one-year period allowed therefor under the license; it made no attempt to obtain an extension of time under Section 13 of the Federal Power Act (16 U.S.C. 806); it proceeded in the face of impending review of the license below and possible further review by this Court. The Company cannot now convert its "calculated risk" into a legal right to be a party in this proceeding. Its rights are no greater than if it had done no construction work whatever. Its rights are no greater than those of the interested third persons in the cases cited in paragraph 2, *supra*, where intervention was denied.

6. The title of Mr. Justice Black's order, entered August 15, 1956 upon petitioner's application for a stay, in no way fixed the Company's status as a party in this proceeding.

7. Mr. Justice Black's order of August 15, 1956, denied the application for a stay. It was predicated on the filing by Idaho Power Company of certain waivers and commitments to protect the Government—in case the license should ultimately be held invalid—against possible claims and expenses that might

[1] Counsel for Idaho Power Company so stated before the Court of Appeals, and again before Mr. Justice Black on August 1, 1956, in connection with petitioners' application for a stay.

be asserted against or incurred by the Government, arising out of the Company's construction work. The waivers and commitments were undertaken by the Company voluntarily, to avert a possible stay. They give the Company no special right to be a party respondent in this proceeding. The Company's liability on its undertakings will not be determined by any action of the Court in this controversy, but by the Company's own conduct after the case is disposed of.

8. In view of the foregoing analysis, it is plain that the Idaho Power Company motion involves no question of Constitutional due process.

9. Finally, it should be noted the Company does not contend, and there is no reason to believe, that the Commission and the Solicitor General will fail to present to this Court all pertinent arguments in defense of the contested license.

10. For the foregoing reasons petitioners submit that the motion of the Idaho Power Company should be denied, but repeat that they have no objection to the Company's participation in this proceeding as *amicus curiae*.

Respectfully submitted,

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February 28, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Presiding Examiner (Pet. App. E 64–209) are not reported. The opinion and principal order of the Federal Power Commission (Pet. App. C 19–61) are reported at 9 PUR (3d) 405. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. B 5–18) is reported at 237 F. 2d 777.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 9, 1956 (Pet. App. B 18). Rehearing *en banc* was denied on November 16, 1956. The petition for a writ of certiorari was

filed on February 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The principal questions presented are whether the Court of Appeals erred in refusing to upset the judgment of the Federal Power Commission (1) in declining to recommend to Congress under Section 7 (b) of the Federal Power Act the federal development of a high dam in the Hells Canyon reach of the Snake River and (2) in concluding, as its basis for issuing a license, that a three-dam development proposed for construction and operation in that reach by respondent Idaho Power Company were "best adapted to a comprehensive plan" within the meaning of Section 10 (a) of the Act.[1]

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended, 16 U. S. C. 791, *et seq.* are set out in the Appendix, *infra,* pp. 30–32.

STATEMENT

Petitioners seek review of two orders of the Federal Power Commission:—one, issued August 4, 1955, in which the Commission granted a license to the Idaho Power Company to construct, maintain and operate three hydroelectric developments (commonly known as Brownlee, Oxbow, and Hells Canyon) in the Hells Canyon reach of the Snake River (Pet. App. C 44–

[1] Petitioners undertake to present nine questions (see Pet. 2–4) of which most are decidedly subsidiary. The latter are discussed at pp. 26–29.

61); and the second, issued November 3, 1955, in which the Commission approved certain revised exhibits in connection with the proposed construction (Pet. App. D 62–63).

Background. By May 1953, Idaho Power had applied to the Commission for licenses to construct these three hydroelectric developments on the Snake River, a tributary of the Columbia River. The Snake River in the Hells Canyon reach, where Idaho Power proposed to construct its dams, runs through a deep gorge with a substantial fall. Upstream of the Hells Canyon site are several reservoirs providing about 8,500,000 acre-feet of storage capacity, of which 2,200,000 acre-feet is used primarily for flood control and the remainder is available for flood control and irrigation.

Each of the developments in Idaho Power's three-dam plan would have rockfill dams. Brownlee would be located about 285 miles above the mouth of the Snake, Oxbow about 273 miles, and low Hells Canyon about 247 miles. The Brownlee unit would develop a head of 277 feet, have initially 360,400 kilowatts of installed generating capacity with provision for 180,200 additional kilowatts, and usable storage of 1,000,000 acre-feet with a maximum drawdown of 101 feet. Oxbow would develop a head of 117 feet, have initially 151,000 kilowatts of generating capacity with provision for 75,500 kilowatts additional capacity, and provide a usable pondage of 6,200 acre-feet. The low Hells Canyon unit would develop a head of 208 feet,

have 272,000 kilowatts of generating capacity with provision for 136,000 kilowatts of additional capacity, and provide a usable pondage of 11,200 acre-feet. The three-dam plan would thus develop the full head of 602 feet and provide 783,400 kilowatts of initial capacity with provision for an ultimate capacity of 1,175,100 kilowatts (Pet. App. C 22).

Petitioners intervened before the Commission in opposition to the granting of Idaho Power's application. They urged, *inter alia*, that the Commission should instead recommend to Congress, under Section 7 (b) of the Act, *infra*, p. 31, the construction by the United States of a high Hells Canyon project as suggested in 1948 by the Army Corps of Engineers to Congress as part of its so-called "main control plan" for the comprehensive development of the Columbia River and tributaries and as modified by the Bureau of Reclamation of the Department of Interior.[2] The high Hells Canyon project would be located about 247 miles above the mouth of the Snake River, in the vicinity of the low Hells Canyon site, and would have a concrete arch dam providing a usable storage of 3,880,000 acre-feet and 800,000 kilowatts of generating capacity with a provision for a ninth 100,000 kilowatt

[2] H. Doc. No. 531, 81st Cong., 2d Sess. Congress has never approved nor authorized the construction of this project, either as originally proposed by the Corps of Engineers or as modified by the Bureau of Reclamation, although there have been numerous efforts to obtain such authorization. For the most recent history see S. Rep. No. 2275 and H. Rep. No. 2542, 84th Cong., 2d Sess., in which Committees of both Houses reported favorably upon proposed bills. However, at its last Session Congress again refused to enact the proposal into law. 102 Cong. Rec. 12294–5 (unbound).

generating unit. Petitioners also contended that the application should be denied because Idaho Power's three-dam proposal was not "best adapted to a comprehensive plan" of development of the waterway, as required by Section 10 (a) of the Act, *infra*, pp. 31–32 (Pet. App. C 23, B 7–8).

Hearings were had before a Presiding Examiner of the Commission at which the three-dam plan proposed by Idaho Power was compared in detail with the high Hells Canyon project pressed by petitioners. After protracted proceedings which produced a record consisting of over 400 documents and some 20,000 pages of testimony on highly technical economic and engineering problems (Pet. App. E 65), the Presiding Examiner submitted a comprehensive and detailed proposed decision (Pet. App. E 64–205). Pointing out the complexity of the problems of evaluating the comparative merits of the two projects (Pet. App. E 65–66),[3] the Presiding Examiner rejected peti-

[3] "Some of the difficulty in dealing with the record in this proceeding has arisen from the need to employ many different assumptions on many different subjects to reach usable results, since, of course, most of the key factors are securely locked behind the doors of Time. * * * The combinations of assumptions in this record are almost endless, and, some it might be argued, almost valueless. Most of the elaborate analyses in the record are based upon pure guesswork—by experts who have utilized all of the skills and science available to the human mind—but nevertheless, still pure guesswork. The able engineers who have come up with widely divergent results in the various phases of this problem have done so because they have used different basic assumptions, because utilizing the same assumptions all engineers must necessarily reach the same results. The choice of assumptions which should govern the analyses and thus the results, is an arbitrary one, and is based largely upon viewpoint."

tioners' contention that the Commission should recommend federal construction of high Hells Canyon (Pet. App. E 155–157). In addition, he recommended the granting of a license to Idaho Power for only the Brownlee dam on the ground that there would be no market in the near future for the power which would be produced by Idaho Power at Oxbow and low Hells Canyon at the price which he estimated Idaho Power would have to charge (Pet. App. E 110). The matter was thereafter submitted to the Commission on exceptions, briefs and oral argument. On August 4, 1955 the Commission issued its order granting a license to Idaho Power for the construction and operation of the three-dam project.

The Commission's Opinion and Order. In its opinion, the Commission recognized that any plan for development of the Hells Canyon reach of the Snake River must take into account the Corps of Engineers' plan for comprehensive development of the Columbia River and its tributaries (Pet. App. C 27), but the Commission was of the view that that plan did not preclude it from granting the license (Pet. App. C 37). The Commission noted that only 26% of the total plan was complete or under construction, and that since 1948 new studies, changing conditions, and various problems arising in the process of translating general plans into actual developments, have necessitated adaptation and revision of the main control plan in several instances, so as to eliminate some projects and add others (Pet. App. C 27–28). Accordingly, the Commission concluded that the objects of the main control plan could be achieved "by a

number of different combinations of projects distributed in the major streams of the Columbia River Basin" (Pet. App. C 28).

Turning to the flood control features of the two projects, the Commission found that the high Hells Canyon dam would provide 2,300,000 acre-feet of flood control storage while the three-dam plan would provide only 1,000,000 (Pet. App. C 28; Fdg. 11, Pet. App. C 49). Since the latter amount was less than originally recommended by the Corps of Engineers (Pet. App. C 28; Fdg. 11, Pet. App. C 49), the Commission recognized that the additional storage capacity would have to be provided elsewhere if the three-dam proposal were approved, but the Commission noted that other sites are presently available (Pet. App. C 28), and provision for such storage should not be a problem.[4] The Commission also noted that the Department of the Army, the agency principally concerned with flood control, had not objected to Idaho Power's proposal to provide 1,000,000 acre-feet of flood control storage at Brownlee and had recommended license conditions requiring Brownlee to be operated under Army direction for flood control purposes (Pet. App. C 29). The Commission concluded that immediate construction of Brownlee would be

[4] The Commission found, in particular, that the plans for the so-called "Libby" project had been revised to provide for over 750,000 additional acre-feet of storage. Also, two additional projects—Bruces Eddy and Penny Cliffs—which were not included in the "main control plan" are now under consideration and, if approved and constructed, would have a combined flood control storage capacity of 3,700,000 acre-feet (Pet. App. C 28).

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consistent with the Army's present flood control plans, particularly since, with existing upstream storage, Brownlee's storage capacity would be adequate to control the Snake River runoff for the second greatest flood of record (Pet. App. C 29).

Considering navigation benefits, the Commission found that, since the Corps of Engineers had estimated that the total navigation benefits ranged from $189,000 to $250,000 annually for high Hells Canyon and from $108,000 to $150,000 annually for the three-dam proposal, the navigation benefits of either plan were relatively insignificant when compared to their over-all benefits (Pet. App. C 30; Fdg. 12, Pet. App. C 49).

As to recreational benefits, the Commission commented that, if reasonably good access roads are provided in the area, it would become an important recreational attraction whichever plan of power development was put into effect; either plan would have favorable recreational features such as boating, swimming, and lake-side developments. Insofar as fishing and hunting are concerned, the three-dam proposal would probably be superior but, on an over-all basis, high Hells Canyon would probably attract more tourists because of its size. (Pet. App. C 30–31; Fdg. 14, Pet. App. C 49–50.)

Both plans would adversely affect the fish and wildlife resources of the area, particularly the anadromous fish. Under either plan, proper measures for the conservation of these resources could and would be taken and it was assumed by all parties that at least $5,000,000 would be required for a fishery program.

In addition, there are archeological and historical remains in the area which should be salvaged at a nominal cost under either plan. (Pet. App. C 31; Fdgs. 16, 17, 39–41, Pet. App. C 50, 52.) [5]

Having thus found that "the public purposes such as flood control, navigation, and recreation could be effectuated to about the same extent under either plan of development" (Pet. App. C 31), the Commission turned to a consideration of power production, which constitutes about 85% of the total benefits to be derived under either plan. Adverting to the fact that the usual procedure for evaluating a proposed project consists of a series of estimates resulting in two monetary items, *i. e.*, power costs and power values, which are to be compared, the Commission pointed out that when two mutually exclusive plans are to be compared, it is essential that the comparison be on comparable bases, and that this would include the same assumed basis of financing whether that be private or federal (Pet. App. C 31–32). And in making such comparisons, the Commission noted that the numerous assumptions and prognostications which underly each of the elements considered in arriving at power costs and values [6] must also be the same (Pet. App. C 32). Com-

[5] The Commission also found that neither plan would directly supply water for irrigation (Fdg. 15, Pet. App. C 50), but that federal construction of either plan of development could provide power revenues to subsidize irrigation works if such use was authorized by Congress (Fdg. 19, Pet. App. C 50).

[6] For example, one of the elements used in determining power costs is unit of output, and its ascertainment depends, in the circumstances of this case, upon such matters as length of critical period, magnitude of assumed decrease in stream flow

menting that the estimates of power costs and values in the record varied depending upon the assumptions made and evaluation methods used by the several witnesses (Pet. App. C 36), the Commission concluded (Pet. App. C 36; see also Pet. App. C 50):

> After full consideration of the comparative economics of the power features of the one-dam and the three-dam plans as presented by the evidence of record and as analyzed in the several briefs filed herein we conclude that, assuming financing, construction and operation of both plans by the same entity, the ratio of power benefits to power costs of the three-dam plan is greater than that for the one-dam plan, and although the high Hells Canyon Project would produce a greater amount of power than the three-dam plan, the additional amount of power that could be produced by the high Hells Canyon Project would have a benefit-cost ratio of about one to one. [7] Consequently the power features of the one-dam plan have no clear economic advantage over those of the three-dam plan.

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in future years due to increased consumption of water in irrigating lands now receiving no or insufficient water, the number of downstream plants in operation and the volume of storage available in the Columbia River Basin. Another element is estimate of cost itself, which includes not only capital cost of construction but also annual cost items plus annual operation and maintenance costs. On the latter element, estimates on the three-dam proposal were introduced into the record, based on at least six independent surveys, which estimates varied among themselves by as much as 28%. See Pet. App. E 81, 85–91, 131–134.

[7] A benefit cost ratio of one to one indicates that the cost of producing the power equals its value.

On the basis of these findings, the Commission concluded that it should not recommend the construction of the high Hells Canyon dam to Congress under Section 7 (b) of the Act and further that Idaho Power's three-dam proposal is best adapted to a comprehensive plan of development, as required by Section 10 (a) (Pet. App. C 37–38; Fdg. 48, Pet. App. C 53). The Commission also found that Idaho Power had met the standards for the issuance of a license, including that of marketability of the power. In this regard, the Commission adverted to the estimates of record showing that the output of the three developments would be fully utilized in Idaho Power's own system by about 1975. (Pet. App. C 38–39; Fdg. 32, Pet. App. C 52.) [8]

On August 4, 1955, the Commission ordered that a license issue to Idaho Power authorizing its construction and operation of the three-dam project (Pet. App. C 55–61).[9]

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[8] The Commission also noted that if Idaho Power could construct the dams at a cost of $133,000,000, as estimated by it, rather than the $186,000,000 figure ($175,000,000, plus interest during construction) adopted by the Commission, the marketability of the power and therefore the economic feasibility of the project would be increased materially (Pet. App. C 41; Fdg. 29, Pet. App. C 51).

[9] In this order, the Commission directed Idaho Power to file certain revised drawings relating to the general design of the dams (Pet. App. 56). These drawings were filed on September 12, 1955, and although petitioners had notice of the filing, they did not seek to intervene in the proceedings nor did they request a hearing. The Commission approved these drawings on November 3, 1955. (Pet. App. D 62–63.) This order is also under review in this proceeding.

On petitioners' appeal to the court below,[10] the orders of the Commission were affirmed (Pet. App. B 5–18). The court stressed that, since both Section 7 (b) and Section 10 (a) are phrased in terms of "the judgment of the Commission," the Commission has broad discretion and judicial review is extremely limited (Pet. App. B 7–8). In connection with the Commission decision against recommending federal construction under Section 7 (b), the court noted that Congress had rejected proposals to construct the high dam on numerous occasions and that early authorization was at best improbable (Pet. App. B 12–14). And after concluding that the Commission's decision not to recommend federal construction was not improper, the court held that the Commission correctly declined to compare Idaho Power's proposals for private construction with a federally-constructed high Hells Canyon in order to ascertain which was "best adapted to a comprehensive plan" of development under Section 10 (a) (Pet. App. B 16). Moreover, even if the federal plan, rejected under Section 7 (b), must be considered in deciding whether

[10] Since petitioners did not initially request the court to stay the Commission's orders, Idaho Power proceeded with the construction of the Brownlee dam. Petitioners first requested the Court of Appeals to grant a stay in June 1956, 10 months after the Commission had granted the license and about six weeks after the case had been orally argued and submitted to the court below. Upon denial of a stay on July 2, 1956, petitioners applied to a Justice of this Court. Mr. Justice Black denied the stay on the condition that Idaho Power give a bond to the United States. Meanwhile, Idaho Power has been proceeding with the construction of the Brownlees dam. To date, over $15,000,000 has been expended and the construction work is now 40% complete.

the three-dam proposal satisfies the requirements of "most comprehensive plan" under Section 10 (a), the court found that the Commission's conclusion, that the three-dam scheme qualified for a license under Section 10 (a), was not without basis in the record. (Pet. App. B 17).

ARGUMENT

Apparently accepting the Commission's findings as to the comparative merits of the two proposals for the development of the Hells Canyon reach of the Snake River,[11] petitioners insist that the court below erred in declining to upset (1) the Commission's refusal to recommend to Congress federal construction of high Hells Canyon under Section 7 (b) and (2) the Commission's finding that Idaho Power's three-dam proposal was "best adapted to a comprehensive plan" of development of the waterway under Section 10 (a). However, as the court below pointed out, both of these actions are, by the express terms of the statutory provisions, committed to the "judgment" of the Commission. Consequently, since "it cannot be said * * *

[11] Although petitioners do not contest the Commission's findings, they do misread what the Commission found. Thus, they assert (Pet. 6–7) that the Commission found that the benefits of the high Hells Canyon dam would exceed those of the three-dam plan, citing the Commission's Findings 5, 7, 10, 11, 12, 14, 18 (Pet. App. C 46–50). But these findings, either alone or together with the accompanying opinion of the Commission, reveal beyond any doubt that the Commission found that the high dam produced greater benefits *solely* in the area of flood storage capacity and that, in other respects, the difference was either too slight to consider (Fdg. 12, 14, 17, 21) or, in the case of power production, the incremental energy production of the high dam would cost as much to produce as it would be worth (Fdg. 18); see pp. 7–10, *supra*.

the judgment which [the Commission] exercised had no basis in evidence and so was devoid of reason" (Pet. App. B 18), or that wrong standards were applied by the administrators, the Court of Appeals' affirmance of the Commission's orders was plainly in accord with this Court's recent decision in *Chapman* v. *Federal Power Commission* (the *Roanoke Rapids* case), 345 U. S. 153.

1. Petitioners' contention that the Commission misconstrued and misapplied Section 7 (b), *infra*, p. 31, has two aspects:—first, that the Act, as interpreted by the Commission and the court below, does not clearly or adequately set out the considerations relevant to a proper decision under this section (Pet. 20), and, second, that, in reaching a decision in the instant case, the Commission failed to afford proper effect to certain specific factors (Pet. 17–19). Neither aspect of petitioners' argument has any merit.

(*a*). The Federal Power Act of 1920 was enacted by Congress in an attempt systematically to develop national water resources and thereby discontinue the alarming dissipation of these valuable national assets. *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180, 181, and cases there cited; Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9, 19 (1945). As enacted, and as administered for over 35 years, the Act seeks to encourage the immediate and comprehensive development of power resources by public or private agencies under such regulation as to protect every legitimate public interest. The *Roanoke Rapids* case, 345 U. S. 153, 168. Realization of these goals, how-

ever, must be preceded by a decision as to whether particular hydroelectric developments should be constructed under private or federal auspices, and this involves the evaluation and comparison of factors which are complex, specialized, and highly technical. Rather than attempt to spell out these considerations in detail, and thereby perhaps hamstring the effective implementation of the Act, Congress left recommendations of federal construction solely to "the judgment of the Commission", and thus emphatically left the choice to the Commission's informed discretion, based on its years of experience with power projects.[12] In dealing with the comparable contention in ***Roanoke Rapids, i. e.*** that the Commission was *required* under Section 7 (b) to recommend public construction of certain projects, this Court wrote (345 U. S. at 173–174):

> Section 7 (b) is a direction to the Commission not to approve a private application for a project "affecting" any development of water resources which, in the judgment of the Commission, should be undertaken by the United States itself. Petitioners in effect ask us to tell the Commission what it thought—to say to the Commission that it was its judgment that Roanoke Rapids * * * should be built by the Government. * * * *Primary responsibility*

[12] The Commission has recommended federal development to Congress under Section 7 (b) only once, and that recommendation was not adopted by Congress. The subsequent grant by the Commission of a license for non-federal development of that project was affirmed in *Lake Ontario Land Development* v. *Federal Power Commission*, 212 F. 2d 227 (C. A. D. C.), certiorari denied, 347 U. S. 1015.

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> *for the enforcement of the provisions of §7 (b) must remain with the Commission;* we cannot infer a judgment of the Commission that it never expressed and now specifically disavows. * * *
>
> * * * *Whatever the merits of the controversy as to which agency—the Government or a private party—should construct this project, that question is not within our province.* [Emphasis added.]

Similarly, Congress left to the Commission—which was to draw upon the engineering, economic, and technical evidence before it, as well as the history of its experience with power developments—the authority to make the initial decision whether or not a federal project should be undertaken. As the direct arm of the Congress in that respect, the Commission did not need to be given detailed standards or criteria. The general guidepost of "public purposes" was sufficient, as the related standard of "public interest" is adequate in other, comparable, contexts. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 225–226.[13]

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[13] Petitioners contend that *Roanoke Rapids* is inapplicable here since there the project for which the license was upheld was substantially identical with the Roanoke Rapids project in the Army's comprehensive plan for the Roanoke River Basin (Pet. 21–23). But here, the Commission has found—and petitioners apparently accept the Commission's findings—that direct benefits from high Hells Canyon would not be substantially in excess of those resulting from the three-dam proposal. Moreover, the identity of the projects in *Roanoke Rapids* played no part in this Court's ruling in regard to Section 7 (b). In this connection, it is significant that the Court regarded as "[p]articularly relevant" the fact that despite Congressional approval "public development at this site would

(*b*) Equally without substance is petitioners' claim that the Commission improperly considered, or accorded incorrect weight to, certain factors in the process of reaching its decision. Petitioners argue that the substantially higher cost of high Hells Canyon, as compared to the three-dam proposal, should not have been considered because the outlay was really in the nature of an investment, because federal development contemplated under Section 7 (b) necessarily involves federal expenditures, and because the advisability of such outlay is a political matter, appropriate solely for legislative consideration (Pet. 17).[14] However, apart from the fact that Section 7 (b) left to the *Commission's* judgment the ascertainment of the relevant criteria and the weight to be accorded them in each case (see *supra*, pp. 14–16), petitioners forget that cost is a necessary element in determining the cost-benefit ratio, the market potential, and the relative economic feasibility of the projects to be compared. Section 7 (b) certainly did not contemplate that the Commission would recommend economically impractical projects and thereby advise the dissipation of public monies. And the

not in the normal course be undertaken for many years" (345 U. S. at 169). Here, not only has Congress not approved high Hells Canyon, but, as the court below pointed out (Pet. App. pp. 12–14), the repeated efforts over the last 8 years to obtain Congressional authorization for Federal construction have been uniformly unsuccessful. See *supra*, p. 4, fn. 2.

[14] Of course, to the extent that the issue is a political matter, it is solely a problem between the Congress and the Commission. As we have just pointed out, to date Congress has consistently declined to authorize such outlays. *Supra*, p. 16, fn. 13.

Commission may surely consider relative cost where, as here, it finds that the public purposes contemplated by Section 7 (b) "will be realized without expense to the United States to the extent that the projects are constructed by a non-Federal entity" (Pet. App. C 36).

In the same vein, petitioners appear also to urge that *controlling* significance should have been afforded to the alleged fact that federal financing would have better served certain broad economic purposes, such as the sale of cheap power and the consequent development of industry in the Pacific Northwest (see Pet. 25–26). Assuming that those advantages could be obtained, they would clearly be relevant considerations under the statute; but it does not follow that the existence of such indirect benefits is conclusive upon the issue of federal vs. non-federal development.[15] As pointed out by the Court of Appeals, these indirect benefits would result only because power from a fed-

[15] Petitioners suggest that the conclusion of the Presiding Examiner on this issue was at variance with those of the Commission and the court below (Pet. 19), but that is not the case. After noting that certain indirect benefits of federal construction were relevant to the question of federal vs. non-federal development (Pet. App. E 149–151), the Examiner commented that "[t]his is not to say * * * that in every case where it is found that the Federal Government could develop the resources at a lower cost and could, therefore, market the power at a lower rate, private development could not be licensed. While cost is an important factor, it is not necessarily the decisive factor." (Pet. App. E 151–152.) More significantly, even though the Presiding Examiner may have disagreed to some extent with the Commission and the Court of Appeals as to the weight to be given to this consideration, he still declined to recommend federal construction (Pet. App. E 152).

erally-constructed dam can be marketed at a relatively low cost "due to the Government's superior credit and its freedom from taxation. If this were the [decisive] criterion under Section 7 (b), federal development would invariably be preferable and the Commission's authority to issue licenses to private applicants could never be exercised without first recommending the proposals for federal construction * * *." (Pet. App. B 11; see also Pet. App. C 23–24.)[16]

2. Petitioners further contend that the Court of Appeals erred in affirming the Commission's finding that the three-dam proposal was "best adapted to a comprehensive plan" of development within Section 10 (a), *infra*, pp. 31–32. This contention has three separate facets: first, that Section 10 (a), like 7 (b), does not set out with requisite clarity any objective standard to test applications for licenses (Pet. 11, 20); second, that the Commission was bound to follow the recommendations of the Army Corps of Engineers as to the "comprehensive plan" of development (Pet.

[16] That these indirect benefits would result not from the alleged superiority of the high Hells Canyon project but rather from the superior credit and tax position of the Government is evident from the Commission's findings 19 and 20 (Pet. App. C 50):

"Federal construction of either plan of development proposed for the Hells Canyon reach could provide power revenues to subsidize irrigation works if such use is authorized by Congress."

"Federal construction of either plan of development proposed for the Hells Canyon reach could make possible a more extensive development of the phosphate resource located on land of the United States in Idaho and Utah than exists today."

13–14); and, finally, that inconsistent criteria were applied by the Presiding Examiner, the Commission, and the court below in considering whether the three-dam proposal met Section 10 (a)'s "best adapted" requirement (Pet. 11–12). These arguments are likewise without substance.

(*a*). Contrary to petitioners' claim, Congress explicitly provided the criteria to be applied by the Commission under Section 10 (a): *i. e.,* improving or developing waterways, benefiting interstate or foreign commerce, utilizing water power, and assisting in the development of recreational and other beneficial public uses. Simultaneously, however, Congress left it up to the Commission to approve such project "as in the judgment of the Commission will be best adapted to a comprehensive plan" for the fulfillment of these policies. As pointed out in *Roanoke Rapids,* in specific reference to these provisions (345 U. S. 153, at 171):

> Subordinate arguments are made, bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here * * *. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised

had no basis in evidence and so was devoid of reason.[17]

See also *Federal Power Commission* v. *Idaho Power Company,* 344 U. S. 17, 21; *Montana Power Company* v. *Federal Power Commission,* 112 F. 2d 371, 374 (C. A. 9); *Namekagon Hydro Co.* v. *Federal Power Commission,* 216 F. 2d 509, 511 (C. A. 7).

(*b*). Also without merit is the claim that the Commission is bound to accept the recommendations of the Army Corps of Engineers as to comprehensive development of the watershed (Pet. 14).[18] Since the recommendations of the Army Engineers were them-

[17] There is no claim in the petition that the Commission's findings in this case were without basis in the evidence. *Supra,* p. 13 and fn. 11.

[18] Petitioners baldly assert that the Commission itself had endorsed the Army's recommendation (Pet. 14). The Commission, however, made it clear that the letter of June 1949, referred to by petitioners, was not intended to—and did not—constitute an endorsement of the Army's plan (Pet. App. C 25):

"Interveners seem to think those letters endorsed the plans then presented for comment, but we believe the Commission's decision *In the Matter of City of Tacoma, Project No. 2016,* 10 FPC 424, 427–8; 92 PUR NS 79, 82 correctly states the import of those letters. There we said:

" 'The Commission has neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power in commenting upon such comprehensive plans of the Army Engineers as were submitted in 1948 * * * Upon the filing of the instant application, however, the responsibilities assigned to the Commission under the Federal Power Act * * * required full and impartial evaluation of the applicant's proposal on its merits and the objections thereto, * * *.' "

selves modified by the Bureau of Reclamation of the Department of Interior which would be responsible for the project if federally constructed (see *supra*, p. 4), and since Congress has not approved the recommendations of either agency with respect to the development of Hells Canyon, petitioners in effect are urging that, for some reason, the Commission must defer to the views of co-ordinate, not higher, agencies of the Government.

Such a contention flies in the face of Section 10 (a), which expressly authorizes the *Commission* to grant a license when "in the judgment *of the Commission*" a project is "best adapted to a comprehensive plan" of development (emphasis added). Moreover, since Congress first authorized the Corps of Engineers to prepare comprehensive plans in 1927 (see Pet. 13), it could hardly have referred to the plans so prepared, or intended them to be binding upon the Commission, when it enacted the Federal Water Power Act in 1920 and first used the term "a comprehensive plan." In *Roanoke Rapids*, this Court indicated that the Commission was not even bound by every detail of plans developed by the Corps of Engineers after they had been approved by Congress; such congressional approval, the Court stated, "can be read * * * simply as saying that [such] a plan * * * should be accepted by the Commission as the comprehensive plan * * *." 345 U. S. at 168–169. It is the Commission, not the Corps of Engineers, which Congress established as its "permanent disinterested expert agency" to formulate and carry out general power policy. 345 U. S. at

167, 168; see, also *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, 180, 181.

This is not to say that substantial weight was not attached, in this case, to the recommendations of the Corps of Engineers. On the contrary, extensive reference was made throughout the proceedings to the recommendations of the Engineers,[19] and particularly to the fact that the three-dam plan, while it could substantially equal the benefits of the high dam in every other respect, would provide somewhat less storage capacity for flood control purposes. The Commission also noted that the Corps of Engineers had modified its main control plan which could be achieved by a number of different combinations of projects to reduce the maximum flood flows at The Dalles on the Columbia River to 800,000 cubic feet a second (pp. 6–7, *supra*); that other sites, which were available and under consideration, would provide requisite flood control (p. 7, *supra*); that the Corps of Engineers had not objected to granting a license to Idaho Power to construct the three-dam project (p. 7, *supra*); and that the storage capacity of Brownlee would, if constructed immediately, be sufficient to control the second greatest runoff in the history of the river, while an unrealized proposal, no matter how comprehensive, would be of little assistance (pp. 7–8, *supra*). On the whole, the Commission was "convinced that the immediate construction of the Brownlee project would be consistent with the Army's present plans" (Pet. App. C 29;

[19] See *e. g.*, Pet. App. B 9–11, 12, 15–17 (opinion of the Court of Appeals); C 22–23, 27–29, 33 (opinion of the F. P. C.); E 78–81 (opinion of the Presiding Examiner).

see also Pet. App. E 176, Fdg. 169 of Presiding Examiner).[20]

(*c*). Another of petitioners' claims with respect to Section 10 (a) is that the Presiding Examiner, the Commission, and the court below applied inconsistent criteria in determining whether the three-dam proposal met that section's "best adapted" requirement (Pet. 11–12). While the Presiding Examiner recommended that only the Brownlee project be licensed, his proposed denial was based solely upon the finding that power from the Oxbow and low Hells Canyon projects could not be marketed profitably in the immediate future (Pet. App. E 122, Fdg. 45). Aside from this finding, it was concluded in all the proceedings below that the three-dam proposal satisfied the statutory standards. Moreover, even assuming, (as petitioners contend (Pet. 17–19)) that the Court of Appeals differed somewhat with the Commission in its formulation of the governing criteria, it is decisive here that the court nevertheless accepted the administrative conclusion and affirmed the Commission's order. Compare Pet. App. B 11 with Pet. App. C 38–39.

Petitioners' sole specific objection on this phase of the case is that, in testing the conclusion that the three-dam plan was best adapted to a comprehensive development, the Commission and the court compared it with the high Hells Canyon project on the basis

[20] To implement further the Army's plans for flood control, the Commission adopted the Army's recommendation that Brownlee be operated under the Army's direction for flood control purposes. Pet. App. C 58–59. *Supra*, p. 7.

of identical financing. But it is a common practice to compare alternative proposals on this basis and, in fact, such comparisons were utilized by the Corps of Engineers in the 1948 Report relied upon so heavily by petitioners (see H. Doc. 531, 81st Cong., 2d Sess., Vol. V, pp. 2150, 2154). Furthermore, since petitioners were pressing for the high Hells Canyon dam solely on the assumption of federal construction, there was no obligation upon the Commission to compare high Hells Canyon on that basis with the three-dam plan in deciding whether to issue a license under Section 10 (a). Once a decision has been made against recommending federal construction under Section 7 (b), the determination under Section 10 (a) must necessarily be in terms of private development and the attainment, on the basis of private financing, of those fundamental engineering objectives subsumed in the requirement of comprehensive development.[21] Here, there was no competitive private application for a license, nor did petitioners introduce any evidence—or even urge—that some privately-financed project, other than that proposed by Idaho Power, could be better adapted to a comprehensive plan. Plainly, in the absence of such a showing by petitioners, they are in no position to argue that the

[21] The Court of Appeals noted in this connection also that, if the Commission were required to evaluate hypothetical federal proposals every time it considered a license application, the license provisions of the Act would become a dead letter as a result of the superior credit standing and immunity from taxation of the Government (Pet. App. B. 11, 15–17).

three-dam plan approved by the Commission was not "best adapted" to such a plan.

3. Petitioners' other objections to the Commission's orders were summarily dismissed as insubstantial by the court below (Pet. App. B 17–18). Such disposition was fully justified, we believe, but even if the court erred, the alleged errors are not of sufficient general importance to warrant review by this Court—as petitioners, while discussing them briefly, apparently recognize.

(*a*). Petitioners claim that, by granting a single license for the three dams and requiring Idaho Power to begin construction of only the Brownlee dam within two years, the Commission violated the requirement of Section 13 of the Power Act, *infra,* p. 32, that licensed project works shall be commenced not more than two years of the date of the license (Pet. 3–4, 27).

Section 13 on its face, however, does not require the commencing of construction of all parts of a single project within two years; after providing for commencement of "construction of the project works" within two years, the licensee, Section 13 commands, "shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. * * *" See *infra,* p. 32. The construction schedule fixed by the Commission accords fully with "the past practice of the Commission extending over a period of more than

thirty years" (Pet. App. C 40), as well as with the express provisions of Section 13.

(*b*). Petitioners also assert that the Commission violated Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)) by failing (i) to determine material issues of facts, (ii) to rule on petitioners' proposed findings and exceptions, and (iii) to discuss the findings of the Presiding Examiner (Pet. 4, 28–29).

But examination of the Commission's opinion and findings shows that the Commission disclosed the reasons for its action, that it made all basic findings essential to a complete understanding of its decision, and that it was not oblivious to petitioners' contentions (Pet. App. 76–115). See also the Commission's order of September 29, 1955, denying petitioners' application for rehearing and motion for stay. The Commission is not required to annotate each finding with the evidence supporting it, nor must it affirmatively make findings on subsidiary issues, or rule individually on each of petitioners' proposed findings. *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 529, 532; *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216. To the extent the Administrative Procedure Act may be applicable, it does not require more. See, *e. g., Capital Transit Co.* v. *United States,* 97 F. Supp. 614, 621 (D. C. D. C.); *Luckenbach S. S. Co.* v. *United States,* 122 F. Supp. 824, 828 (S. D. N. Y.) affirmed, 347 U. S. 984; *National Labor Relations Board* v. *Sharples Chemicals,* 209 F. 2d 645, 653 (C. A. 6). As for the Commission's failure to discuss the Presiding Examiner's findings the most

that petitioners are entitled to is a statement from the Commission on the material issues. As already noted, *supra*, p. 27, they received this much, and consequently the Commission's order is not invalid because of this asserted omission. *Coyle Lines, Inc.* v. *United States*, 115 F. Supp. 272 (E. D. La.).

(*c*). Another contention is that the Commission violated Section 7 (d) of the Administrative Procedure Act, 5 U. S. C. 1006 (d), by relying on matters outside the record (Pet. 4, 29). But the "adjusted" analyses of the evidence, of which petitioners complain, were merely analyses of record evidence plus appropriate adjustments placing the construction costs and the resulting annual costs on a reasonably comparable basis for the purpose of ascertaining the comparative economics of the power features of the high Hells Canyon project and the three-dam project proposed by Idaho Power. In utilizing these "adjusted" analyses, the Commission did not go outside the record, since all data utilized by it are from the record. However, assuming, *arguendo*, that the Commission did look beyond the record, its order is not invalid since petitioners were not substantially prejudiced thereby. *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 530. On the contrary, petitioners were benefited since the economics of the high Hells Canyon project were improved by the "adjusted" analyses used by the Commission.

(*d*). Finally, petitioners complain that the Commission's post-license order of November 3, 1955, approving revised drawings for two of the developments was

made *ex parte*, and without giving petitioners an opportunity to cross-examine, thereby violating (it is said) their rights as intervenors (Pet. 5, 29–30).

The short answer to this complaint is that petitioners were advised by the Commission, by a letter dated September 15, 1955, that Idaho Power had filed the drawings with the Commission; the drawings have since been available for public inspection and copying; and petitioners have at no time requested a hearing on these drawings. The plain fact is that the matter covered by the revised drawings was one of the subjects thoroughly explored during the protracted hearings and further hearings with respect to them would have been merely cumulative and unnecessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1957.

APPENDIX

The Federal Power Act, 41 Stat. 1063, as amended, 16 U. S. C. 791, *et seq.* provides in pertinent part:

Section 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans

of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: * * *

* * * * *

Section 7.

* * * * *

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

* * * * *

Section 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for im-

proving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

Section 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of constructio. may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RUBAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, and IDAHO POWER COMPANY,
Respondents

BRIEF OF IDAHO POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
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PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, and IDAHO POWER COMPANY,
Respondents

BRIEF OF IDAHO POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioners cite the jurisdiction of this Court under 28 U.S.C. § 1254(1). Limitations upon the scope of review are also provided in Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), which states, among other things, that "The *finding* of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." (Emphasis supplied.)

QUESTIONS PRESENTED

1. Whether a departmental report, dated in 1948 and filed with Congress in 1950, but never approved, adopted or authorized by Congress, is a continuing prohibition on the power of the Federal Power Commission to grant a license for a project which is in conflict with one included in the departmental report, but which has been repeatedly rejected by several Congresses?

2. Whether this Court should, in effect, legislate by imposing upon the Federal Power Commission rules or standards not contained in either Section 7(b) or Section 10(a) of the Federal Power Act, which must be followed by the Commission in exercising its judgment under these sections?

3. Whether the Federal Power Commission, in exercising its judgment under both Sections 7(b) and 10(a) of the Federal Power Act, is entitled to consider all pertinent factors, including the comparative costs when evaluated on a similar basis, and the avoidance of Federal expense?

4. Whether, in a situation such as exists here, where Petitioners do not attack any findings as not supported by substantial evidence, they can properly ask this Court to review the correctness of the Commission's judgment by indirectly arguing factual questions under the guise of saying that, as a matter of law, the Commission can or can not consider certain pertinent facts?

STATEMENT OF THE CASE

The petition for certiorari presents solely the question as to the validity of a license issued to Idaho

wer Company (hereinafter "Company") for an droelectric project on the Snake River. Situated ere that river forms the boundary between Oregon d Idaho, the project comprises three dams (Brown-, 395 feet high; Oxbow 205 feet high; and Hells nyon, 320 feet high). Together these dams develop e entire hydraulic head of 602 feet available in that etch of the river and provide 1,000,000 acre-feet of rage, useful for both flood control and power pro-ction. They also provide adequate navigation and reational benefits. It is what has come to be known a multiple-purpose project.

Power installations at the three dams are: Brownlee, 0,400 kilowatts (kw); Oxbow, 151,000 kw; Hells nyon, 272,000 kw; total 783,400 kw; with provision the power houses for installation of additional nerators to bring the ultimate project capacity to 75,000 kw (Apx. 46-47). The alternative single m would develop precisely the same head of 602 feet, d would have essentially the same initial installed pacity, 800,000 kw, with provision for only one ditional generator to bring its ultimate capacity 900,000 kw, *or 275,000 kw less than the 3-dam ensed project* (Apx. 48).

The order granting this license was affirmed by the urt of Appeals for the District of Columbia Cir-it (Petitioner's Appendix, 5-18), which also denied petition for rehearing *en banc*.

Before the Federal Power Commission (hereinafter Commission") the consolidated applications of the mpany were the only applications pending. No val utility or other applicant expressed any desire develop the stream. And, by the time the Com-ission hearings began in 1953, no Department of

the United States wanted to build any competing structure, but on the contrary it had been abandoned by all Federal agencies.

There is here no conflict of jurisdiction or authority between Government agencies (FPC and Interior),—no "conflict of view between two agencies of the Government having duties in relation to the development of National water resources,"—as in the *Roanoke Rapids* case, one of the reasons which impelled this Court to grant certiorari there. *U. S.* v. *Federal Power Commission,* 345 U.S. 153, at 155 (1953).

The sole protestants at the application hearings were Petitioners here, as Intervenors there. These parties did not ask for any license, nor did they themselves propose to build any project. Their opposition was confined solely to the proposition that the construction of a single Federal dam, which would develop the identical 602 foot head but have greater storage capacity, would be a preferable development of the river.

The Company's desperate and immediate need for power for the large area served by it was not questioned, even by Petitioners. The only alternate source of sufficient capacity available, was higher priced steam generation. On the other hand, the Company's licensed project here involved, with its large productive capability, will afford the added generation required in the Company's area and also make speedy contribution to the power short Pacific Northwest. The need for this power is so great that construction of the Brownlee plant has been under way since November, 1955. Power from it can be available next year.

ere is no contention presented in the Petition
n that the Commission's ultimate "finding", or
of its subsidiary findings, are not supported by
antial evidence. Accordingly, this petition must
aluated in the light of the facts set forth in the
nission's 24-page opinion, 55 separate findings,
6-page license order (Apx. 19-61), all of which
derived from the longest hearing ever held on an
oelectric application (with recesses, extending
one full year's time).

om these findings, we find these facts pertinent
ntentions made by the petition here:

) "Thus, it is apparent to us that control of the
flows of the Columbia River can be accomplished
number of different combinations of projects
ibuted in the major streams of the Columbia
Basin" (Apx. 28); and "We are convinced that
mmediate construction of the Brownlee project
l be consistent with the Army's present plans to
ol floods on the Lower Columbia River (Apx. 29).

) "We conclude that the public purposes such as
control, navigation, and recreation could be ef-
ated to about the same extent under either plan
velopment" (Apx. 31).

"After full consideration of the comparative
omics of the power features of the one-dam and
hree-dam plans as presented by the evidence of
d and as analyzed in the several briefs filed
n we conclude that, assuming financing, construc-
and operation of both plans by the same entity, the
of power benefits to power costs of the three-
plan is greater than that for the one-dam plan,
although the high Hells Canyon Project would

produce a greater amount of power than the three-dam plan, the additional amount of power that could be produced by the high Hells Canyon Project would have a benefit-cost ratio of about one to one. Consequently the power features of the one-dam plan have no clear economic advantage over those of the three-dam plan" (Apx. 36).

These are a few of the many basic findings upon which the Commission based its conclusion that the Company's project was best adapted to a comprehensive plan of development.

The Army main control plan emphasized in the Petition herein never advanced beyond the stage of a recommendation by the Army Engineers. It has never been approved by Congress in any form; nor has it been authorized. On the contrary, further studies and review reports are continually being made. It is not static but a changing, varying study, subject to alteration and adaptation as new conditions arise (Apx. 27-29). It is also pertinent that, although proposals for the Federal dam urged by Petitioners have been before Congress continuously for over six years, Congress has never approved or authorized the dam. The last of several defeats of the proposal was by the Senate in July, 1956. A legislative history is attached hereto as Appendix I.

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT—THE COURT BELOW DID NOT MISINTERPRET OR MISAPPLY EITHER SECTION 7(b) OR 10(a) OF THE FEDERAL POWER ACT

A. Petitioners' Contention That Section 7(b) Was Misinterpreted or Misapplied Is Groundless

No valid ground for granting certiorari is presented by Petitioners' argument that there is something that this Court should announce in connection with Section 7(b) of the Federal Power Act (16 U.S.C. Sec. 800(b)). This is the section in which the Congress charged the Commission with the duty of referring a project back to the Congress, with a recommendation, "*whenever, in the judgment of the Commission,*" it was thought that the development of the water resource should be undertaken by the United States itself.

Apparently Petitioners here are arguing that this Court should take jurisdiction of this matter for the declared purpose of reading into the Act provisions or requirements which are not there. In other words, that this Court should legislate.

There is no question here but that the Commission patiently heard and carefully weighed the myriad of complex and complicated engineering and economic questions presented by all parties. Numerous power studies, load forecasts, cost computations, river operation studies, flood control plans, navigational predictions, and a host of other fields were examined. Among other matters, but certainly not as a controlling one, the Commission commented that construction of this project by the Company would obviate the necessity of expending approximately 400 million dollars

out of the United States Treasury; and now, Petitioners want this Court to lay down a judicial fiat that the Commission cannot consider this as one element in deciding whether any given project, to be constructed by a non-federal applicant, should be granted a license! The mere statement of the proposition indicates its absurdity.

And the companion argument under this heading is a contention for a ruling that a project *must* be referred to Congress for Federal development if the cost of power would be less under federal construction. While Petitioners' brief does not state this contention baldly, it is the only possible implication of their argument (p. 10-19). If not so construed the words are meaningless.

This argument, of course, flies straight in the face of the oft-declared purpose of the Federal Power Act to promote speedy development of natural resources by private industry under Federal 50-year licenses, under which the United States retains complete regulatory and repossession powers. Power plants constructed on Federal credit and which are free from taxation can always sell power at lower rates. So that what Petitioners are really urging here is an interpretation of the Act which would render it meaningless. For even they do not contend that the Court below (and the Commission) failed to consider this, along with other factors. And admitting that it *was* considered, and not challenging any findings as unsupported, the argument has to be that lower rates are *as a matter of law* the dominant factor. But the statute does not so state.

With reference to this the Commission said:

> "There is no provision in Section 7(b) or in any other section in the Act which leads us to believe that Congress intended that we recommend Federal development for the sole purpose of making power available at costs lower than would be possible if the same water resources were developed by a private entity under a license. Needless to say if the supplying of power at the lower costs resulting from Federal development should be considered as a decisive factor, there would be few cases involving major power projects where private development could be licensed under the Act because of the substantial difference in annual cost of investment money in favor of Federal over private financing and because of the much higher annual cost of taxes paid under private development as compared with the freedom from taxes under Federal development or, in some few instances, the minor annual payments by some Federal projects in lieu of State taxes." (Apx. 26).

The Court of Appeals said:

> "This would seem contrary to legislative intent, as § 7(b) requires the Commission to recommend federal development only when *"in the judgment of the Commission"* the work should be undertaken by the United States itself. The italicized phrase is read out of the statute if the Commission must recommend every development for federal construction simply because the United States has better credit than any private applicant and is free from taxation" (Apx. 11).

To grant certiorari on the grounds argued by Petitioners under this heading would be contrary to all past decisions of this Court outlining the scope of the Commission's authority and the narrow field of judicial review.

The precise point was raised and decided adversely to Petitioners' contention in the Roanoke Rapids case (*U. S.* v. *Federal Power Commission,* 345 U.S. 153 (1953), affirming the Court of Appeals for the Fourth Circuit (191 F. 2d 796)). On this point, the Court of Appeals said (p. 808):

> "It is argued that the granting of the license to a private company involves the surrender of valuable power rights belonging to the public, because it is said that the government could obtain the capital necessary for development at a low interest rate and could supply current at a low cost to the users of electricity. The question as to whether a power project should be licensed for construction by private enterprise or constructed by the government itself is one which, as we have seen, Congress in section 7(b) of the Federal Power Act has entrusted to the judgment of the Commission; and the Commission has given consideration to the question and has decided it adversely to the contention of the petitioners."

B. Nothing Is Presented by the Petition to Indicate Any Violation of Section 10(a)

Congress has delegated broad discretion to the Commission. It outlines no specifications or criteria on which the Commission's judgment under Section 10(a) are to be based. Instead, it establishes only "vagueish, penumbral bounds" which "leaves wide discretion and calls for imaginative interpretation." *F.C.C.* v. *R.C.A. Communications, Inc.,* 346 U.S. 86, 91, 90 (1953). In exercising its "wide range of discretionary authority" the Commission must "bring to bear upon the problem an expert judgment," *U. S.* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241 (1945), and "draw its conclusions from the infinite variety of circum-

stances which may occur in specific instances." *I.C.C.* v. *Parker,* 326 U.S. 60, 65 (1945).

> "The Commission is required to exercise its judgment as provided in Section 10(a) of the act. * * * The act leaves to the discretion of the Commission what project shall 'be best adapted to a comprehensive plan' for such improvement and utilization. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'. Rochester Tel. Corp. v. United States, 307 U.S. 125, 146, 59 S. Ct. 754, 765, 83 L. Ed. 1147, and cases there cited. * * *" *Montana Power Co.* v. *F. P. C.,* 112 F. 2d 371, 374 (9th Cir., 1940).*

Petitioners' extensive argument under this head consists mainly of an indirect attempt to argue, *first,* that the Court can invade the province of the Commission in using its judgment as to what project will be best adapted to a comprehensive plan, and *second,* that the Court should go behind the findings and tell the Commission what the Commission's judgment should be. The only legal question is the startling contention that a departmental report submitted to Congress years ago, but never authorized or even approved, *must* "as a matter of law" be accepted by the Commission as a controlling plan to guide its decision.

In spite of Petitioners' contention that this Court need not review the facts in this case, they make a fac-

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* Additional authorities: *Alabama Power Company* v. *Federal Power Commission,* 128 F. 2d 280 (D.C. Cir. 1942), *cert. den.* 317 U.S. 652 (1942); *State of Iowa* v. *Federal Power Commission,* 178 F. 2d 421 (8th Cir. 1949), *cert. den.* 339 U.S. 979 (1950); *State of Washington* v. *F.P.C.,* 207 F. 2d 391, 397 (9th Cir. 1953); *cert. den.* 347 U.S. 936 (1954); *Wisconsin P.S.C.* v. *F.P.C.,* 147 F. 2d 743, 748 (7th Cir. 1945), *cert. den.,* 325 U.S. 880 (1945); *Pennsylvania P. & L. Co.* v. *F.P.C.,* 139 F. 2d 445, 451 (3rd Cir. 1943), *cert. denied,* 321 U.S. 798 (1944).

tual argument, which indirectly attacks findings of the Commission (although, as mentioned, they are not attacked as being unsupported by the evidence).

In arguing that the Commission was bound "as a matter of law" by a plan which controls its action, Petitioners are actually arguing that the Commission's statutory authority is limited or restricted whenever the Army Engineers (whose field is limited to flood control and navigation) files a report and recommendation with Congress. Or in other words, that in this indirect way departmental officers can take away from the Commission its specific function of licensing projects—or tell the Commission that it can license certain projects and not others. No statutory authority is cited for such limitation on the power of the Commission.

The report which Petitioners contend here to be such an arbitrary and absolute limitation on the right of the Commission to select the project to be licensed is a voluminous general report dated in 1948, filed with the Congress in 1950, which is self-described as principally an inventory of possible projects to accomplish an assumed goal with respect to flood control. There has never been any Congressional action on the report.

In other words, Petitioners are fundamentally face to face with the fact that Congress not only has not authorized any dam at Hells Canyon, but also has not adopted, authorized or even approved, *any plan specifying a dam of any type or character in this reach of the river.* Further, at the time of the hearings, before the Commission (1953-54), and at the present time, no Federal agency is proposing to build the so-called "high" dam, nor is in any way evidencing any desire

or intention to construct. On the contrary, although bills to authorize a federal dam at Hells Canyon have been before Congress every year since 1950, it has continuously failed to receive any Congressional approval, and has been actively rejected three times—by committee action in 1952 and by Senate votes in 1950 and 1956. (Reference is made to Appendix I, *infra,* for the history of proposed Hells Canyon authorizations.)

Petitioners attempt to bolster their argument by erroneously stating (p. 14) that "the Commission itself endorsed the plan" contained in the Army's report. They overlook the fact, not only that the Commission itself has negatived any such statement in its decision (Apx. 25), but that the same question has formerly been ruled upon by the Commission in at least two reported cases, *In the Matter of City of Tacoma,* 10 F.P.C. 424, 427-28, and *In the Matter of Virginia Electric Power Co.,* 10 F.P.C. 1, 17; and in the latter case both the Fourth Circuit and this Court affirmed the point upon review, *U. S.* v. *Federal Power Commission,* 191 F. 2d 796, at 806; *affirmed,* 345 U.S. 153, at 154-155, 173.

As the Commission pointed out (Apx. 27-29), many of the Army's originally included projects have been eliminated for various reasons; new ones are constantly being proposed, such as Pleasant Valley, and the proposed dams on the Clearwater, a tributary of the Snake, and "one of the worst flood producers in the entire Columbia River Basin". New studies by the Army show that "other changes are contemplated." As the Commission found, the Company's Brownlee storage alone "would be adequate to control the Snake River runoff for the second greatest

flood of record, that of 1948," and is consistent with the Army's flood control plans; that flood control objectives "could be effectuated to about the same extent under either plan of development" (Apx. 29, 31).

Petitioners even go further. They say that even this Court, in determining whether the Commission and Court below properly interpreted Section 10(a), need not look beyond Petitioners' "comprehensive plan" and "optimum development" standards, because of which "it is not necessary in this case to evaluate a host of technical considerations" (p. 14).

In effect, they are telling this Court that it too is bound by this unapproved and unauthorized plan and Petitioners' theory of "optimum development"; and that this Court should now grant certiorari and *tell the Commission not only that its Section 7(b) and 10(a) judgment was wrong, but what it should have been!* That there was "substantial evidence" to support the Commisssion's judgment is not in question; the only question is, *did the Commission have a right to exercise any judgment at all?* In *U. S.* v. *Federal Power Commission,* 345 U.S. 153 (1953), 171, 173 (the *Roanoke Rapids* case) this Court said:

> "* * * The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power to entertain this application for a license, we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no

basis in evidence and so was devoid of reason." (p. 171).

* * *

"* * * Petitioners in effect ask us to tell the Commission what it thought—to say to the Commission that it was its judgment that Roanoke Rapids, as well as all the other seven projects in the Roanoke plan not yet under consideration, should be built by the Government. * * * Primary responsibility for the enforcement of the provisions of § 7(b) must remain with the Commission; * * *" (p. 173)

Petitioners claim that the *Roanoke Rapids* case is not applicable here, and that it "was misread and misapplied below" (p. 21), because the Roanoke dam was essentially the same project as one included in the Army plan for that river. But Petitioners have missed the whole point of that decision; we respectfully suggest that it is they who have "misread and misapplied" the *Roanoke Rapids* case. In that case Congress had "approved" the Army's Roanoke River plan (345 U.S. 153, at 161). Even so, this Court held that such approval did not amount to "adoption", let alone "authorization", of the Roanoke Rapids site, even though it was included in the general plan. The Court held that Roanoke Rapids, therefore, was not preempted for Federal development, and the Commission was not precluded from exercising its "judgment" to issue a license for construction under the Federal Power Act.

Here, although there has been no Congressional approval, but rather thrice repeated Congressional rejection, Petitioners contend (p. 9) that certiorari should be granted because new bills have again been

introduced to authorize Hells Canyon. How long should the Commission wait? We have at least two judicial guideposts, both in the *Roanoke Rapids* cases. The Fourth Circuit (191 F. 2d 796, at 806) referred to the *two-year* waiting period specified in section 4(e) of the Act, involving licenses to utilize surplus water or water power from a Government dam, and said:

> "* * * In the light of this statute, it would certainly be unreasonable to hold that where the government has no dam and has made no decision to build one, the Commission is prevented * * * for a longer period from granting a private license. The natural resources of the country should not be withheld from needed development because of a recommendation of the Commission on which Congress has failed to act."

In affirming, this Court said (345 U.S. 153, at 166):

> "* * * it is pertinent to note that a Committee of Congress responsible for water resources legislation was informed that an application was pending for private construction. Whether or not the Committee agreed that the Flood Control Act of 1944 allowed private construction of projects comprehended in plans there approved, in fact no action was taken by it to prevent the Commission from proceeding to hear the VEPCO application, *although the Committee learned that the application was pending over a year and a half* before the order was handed down by the Commission." (Emphasis supplied).*

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* It is pertinent to note, that the cases here were argued and submitted in the Court of Appeals on May 15, 1956. Congress, for the third time, actively rejected the high Federal dam on July 19, 1956. The Court of Appeals decision was issued October 9, 1956, after Congress had adjourned.

It is a strange position for Petitioners to argue that this unapproved report is controlling "as a matter of law" with respect to a project which has itself been repeatedly rejected by Congress. While Petitioners at one point say the plan is only *prima facie* (p. 14), they argue otherwise by contending that the projects named in the report are the all-controlling yardstick as to what may be licensed. In its essence, then, Petitioners' argument is that even though this report has not been adopted in any way, and even though the precise project has been rejected, the report remains—apparently for time unlimited—as a legal restriction of the Commission's licensing power.

Comparative Cost

Throughout this petition there is repeated, either directly or by implication, the contention that the Commission should not have considered the comparative costs of the projects under consideration. The difference in costs between the 3-dam licensed project and the alternative "high" government dam are enormous. Had the Commission completely ignored them in arriving at its judgment, it would have been a deliberate avoidance of its statutory responsibility.

Official estimates by the Bureau of Reclamation and Bonneville Power Administration of the cost of the High Dam Project were $383,570,000. The cost of the 3-dam development was estimated by the Company at $133,000,000, and by the FPC staff at $186,000,000. For its comparative economic studies, and in order to determine the financial feasibility of the Company's project (Apx. 52, findings 35 and 36), the Commission adopted the latter estimate, but pointed out that "the record indicates that the Applicant may be able to

construct these developments at a lower cost" (Apx. 51, finding 29; and see also Apx. 40-41).

As the Court below said (Apx. 14), the Commission concluded that neither plan of development was more comprehensive than the other in the public purposes to be served; that the fact that the high dam would produce benefits in somewhat greater quantity did not justify the formation of a judgment that the United States should build it, in view of its greater cost and the improbability of its authorization. "Thus the Commission chose between a $400,000,000-plan, which nobody was offering to undertake,"—which had "not been authorized, adopted or even approved by Congress after more than six years of consideration",—"and another comprehensive development for which private capital was immediately available so that construction could begin at once" (as it has, in fact, begun and is well under way). (Apx. 14-15). *Cf.*, The *Roanoke Rapids* case, *U. S.* v. *Federal Power Commission*, 191 F. 2d 796, at pages 808-809 (4th Cir., 1951); *affirmed*, 345 U.S. 153 (1953).

It is a telling commentary on the petition here, that Petitioners' argument is purportedly based on economics,—but it is their own unique theory of economics, wherein dollars (so long as they are to be spent by the Federal Government) do not count. It is inconceivable that Congress, in writing Sections 7(b) and 10(a) of the Act, had any such theory in mind.

No Logical Comparison of Projects Could Be Made Except on a Comparable Basis

Any comparison of the project proposed by the Company, and the one offered as a possible alternate

by Petitioners (as Intervenors below), to be of value had, of necessity, to be objective. The sponsor of a project does not affect its fundamental characteristics. Likewise, any comparisons which are of value whatsoever must be made on like assumptions.

With the mass of testimony, exhibits, reports and estimates before it in the year-long hearing, the Commission adopted criteria for determining "the comparative economics" of the two plans which would permit them "to be compared on as similar basis as is possible from the record" (Apx. 31-32). Petitioners contended that the Commission should "make an economic comparison of the power benefits of the two plans on the assumption of Federal financing for the one-dam plan and private financing for the three-dam plan." As the Commission said, "Such a comparison would be of little value in determining which plan would be the more economic for either Federal construction or private construction" (Apx. 32). The Commission stated the basis for its criteria and judgment on this matter (Apx. 31-32), as did also the Court below in affirming (Apx. 10-11). Under any other method, as both Commission and Court of Appeals pointed out, the Commission could have no "judgment" under Section 7(b), in view of lower cost Federal money and freedom from taxation (Apx. 11, 26). The Commission's method was logical and correct.*

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* Pursuant to S. Res. 281, 84th Congress (Senate Interior and Insular Affairs Committee Print, January 4, 1957, 85th Cong., 1st Sess.), various agencies expressed their recommendations as to methods of project evaluation, cost allocations, etc. The Bureau of the Budget stated as follows (Committee Print, p. 18):

> "In making comparisons with alternate developments, taxes and interest cost should be treated on a comparable basis. For this purpose, costs of a Federal project should be regarded as

In any event, it is not a function of review to create or establish the standards or methods by which the Commission must carry out its functions. *Northwestern Electric Co.* v. *F. P. C.*, 125 F. 2d 882, 885-886 (9th Cir. 1942), *affirmed*, 321 U.S. 119 (1944); *Safe Harbor Water Power Corp.* v. *F. P. C.*, 179 F. 2d 179, 198 (3rd Cir. 1949), *cert. denied*, 339 U.S. 957 (1950).

II.

THE COMMISSION COMMITTED NO ERRORS IN SUBSTANTIVE OR PROCEDURAL LAW

A. The Court Below, in Making Its Judgment Under Section 7(b), Was Not in Error in Disregarding the Possible Aid From Power Revenues to Subsidize Irrigation Projects

Petitioners claim the Commission and Court below erred in disregarding "the opportunity presented by the Federal project to help finance irrigation projects through power revenues" (p. 28). To do this, of course, would require the "loading" of power rates to pay an irrigation subsidy, and the argument is certainly inconsistent with the importance Petitioners attach to "low-cost" power.

However, the basic fallacy in Petitioners' position was properly disposed of by the Commission in its decision (Apx. 26-27). Whether there should be a subsidy for high-cost reclamation developments, either

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including the full normal taxes, including Federal, State, or local, which the project would bear if constructed by private taxpaying participants. Interest costs of both the Federal project and the most likely alternative development should be computed on the basis of the average rate of interest payable by the Treasury on its long-term marketable obligations."

The Federal Power Commission expressed similar views (pp. 22-23). In the Hells Canyon analysis, had the Commission used the above formula (comparison on basis of *private* financing *and taxes*) instead of making the comparison on the basis of *Government* financing, the high dam would have shown up far worse than it did.

through the use of power revenues or directly from the Federal Government, is a matter reposing solely in the Congress. It is a general legislative policy question, and one not related to Hells Canyon or any other individual project.*

B. The Commission's Application of Section 13 Was in Accordance With 30 Years Administrative Practice, and Is Correct

Petitioners next contend (p. 28) that the Commission and Court below erred in misconstruing and misapplying Section 13 of the Act, in that the license included all three dams (Brownlee, Oxbow and Hells Canyon) as units of a single project. The Commission's reasons for this decision and finding are set out in its opinion (Apx. 39-40, and 53, finding 47).

The three dams, together, are essential to develop the full 602 feet of head (or fall) in this reach of the river. Placing the storage in the upper project (Brownlee) enables this same storage, as it is re-

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* The Army Engineers recognized this principle in their report (H.R. Doc. 531, 81st Cong., 2d Sess. (1950), v. 1, pp. 328-30, pars. 79-83), where it is stated:

> "There appears no valid reason why these irrigation projects should be coupled to Hells Canyon as suggested by the Bureau of Reclamation, rather than to Bonneville Dam, McNary, Priest Rapids, or other similar projects.
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> • • • • •
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> "It is not either necessary or desirable that power-producing projects be artificially classified as reclamation projects for this purpose, since the relationship with irrigation can be created only as a balancing of economic and fiscal relationships. Functionally and operationally, the main power-producing potentialities of the Columbia Basin are allied either to navigation, to flood control, or to both, and not to irrigation, except in the case of Grand Coulee, and they should be constructed and operated with this in mind."

leased, to be used through the turbines of the two downstream plants as well. The two lower dams also serve as necessary re-regulating dams, to level out river surges from storage releases, so as to provide a more equalized downstream flow. With the physical characteristics of the area, and of the three units, confronting it, the Commission was fully justified in licensing the three dams as a single project, both as a matter of fact and of law.

Petitioners' arguments as to timing of construction, and their insinuation that the Commission's order in this respect was a "device" which contravened the law, are particularly specious, as the Act itself governs all the matters complained of (Secs. 13, 26, 314-317; 16 U.S.C.A. §§ 806, 820, 825 m-p).

Furthermore, the question of licensing all three dams was considered and submitted at a single hearing. All engineers who testified evaluated the three units as a single project, including the witnesses who testified on behalf of the Petitioners who are now complaining.

The question of the number of hydroelectric units which should be included in, or treated as, a single project is a question of fact and/or policy, the determination of which is peculiarly within the expert judgment of the Commission, *cf., Arkansas Power & Light Co.* v. *F. P. C.*, 125 Fed. 2d 982 (8th Cir., 1942). For over 30 years (Apx. 40) the Commission has been authorizing multi-unit developments within one project license.* It is well settled, of course, that "admin-

* Examples of Federally authorized hydroelectric licenses in which the construction and operation of several dams were deemed to constitute but a single "project works" under one license are

istrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U.S. 294, 313, 315. See also *West Texas Utilities Co.* v. *National Labor Relations Board*, 184 F. 2d 233, 235 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).

C. The Commission Committed No "Basic Procedural Errors"

There remain to be considered the "basic procedural errors" which Petitioners claim (p. 28-29) the Commission committed (1) in failing "to determine material issues of fact or rule on petitioners' proposed findings and exceptions;" (2) in relying "on matters outside the record, consisting of 'adjustments' of evidence, presented as 'analysis' in Commission Staff counsel's brief"; and (3) in approving by its order of November 3, 1955, revised designs for the Brownlee and Oxbow projects.

(1) As to the first point, Petitioners have not specified the "material issues" on which findings were not made, and it is submitted that their lack of definition fails to meet the requirements of paragraph 1(c) of Rule 23 of this Court.

It is apparently Petitioners' contention that because the Commission did not discuss the question of, or make

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Arkansas Power & Light Company, Project No. 271, 3rd Annual Rep., FPC (1923); *San Joaquin Light & Power Corp.*, Project No. 175, 2d Annual Rep., FPC (1922); *Niagara Mohawk Power Corp.*, Project No. 2084, 32nd Annual Rep., FPC (1952); *City of Tacoma*, Project No. 2016, 32nd Annual Rep FPC (1952).—In the *Niagara Mohawk* case, the license provided a period of 3 years and 2 months before construction of the last unit was required to begin; in the *Arkansas* case, the commencement of construction dates, for the first and third units, were separated by a period of *ten years*.

formal finding with respect to, each and every engineering aspect or other feature of the alternative proposals, it "fails to determine material issues." At the outset, it should be pointed out that Petitioners' argument is based on two false assumptions: (1) that two competitive applications were before the Commission, and (2) that the Commission is obligated to make detailed findings upon every point or issue which Petitioners have endeavored to inject into the case.

The issue here is not whether the Commission made findings on certain issues raised by Petitioners, or whether the findings are as detailed as Petitioners think they should be,—but rather *whether the findings which the Commission did adopt are adequate and sufficient upon which to base its decision and judgment under Sections 10(a) and 7(b) of the Act.*

The complete answer to Petitioners' contention is that the Commission did make numerous and complete findings on each of the factors—power production, flood control, navigation, recreation, etc.—which it must consider in making its decision under Section 10(a) of the Act on the Company's license applications.

As stated in *Capital Transit Co.* v. *United States,* 97 F. Supp. 614, 621 (D.C. D.C. 1951):

> "* * * *the Administrative Procedure Act does not require detailed findings of every subsidiary evidentiary fact. So long as the agency makes amply clear the factual basis upon which it has proceeded, there can be no ground for complaint.* Here the facts and policies upon which the Commission proceeded are fully set forth. There appears to be no omission in the Commission's statement which is in any way prejudicial to complainant. There is not lacking any element, either as

> to findings of fact or considerations of policy, necessary to support the present order of the Commission. The requirements of section 8(b) of the Administrative Procedure Act were satisfied." (Emphasis supplied.)

Almost identical language occurs in *Coyle Lines* v. *United States,* 115 F. Supp. 272, 276 (E.D. La. 1953). See also *Public Utilities Commission* v. *Federal Power Commission,* 205 F. 2d 116, 120 (3rd Cir. 1953); *Luckenbach S.S. Co.* v. *United States,* 122 F. Supp. 824, 828 (S.D.N.Y. 1954) *aff'd,* 347 U.S. 984.

The Commission's order must stand so long as there is a "rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 146 (1939).

Applying the test announced in these cases, it is clear that the Commission did make findings upon every issue essential to its decision under Sections 10(a) and 7(b). In addition to the basic findings on power production, flood control, navigation and recreation, the Commission also found that the Chief of Engineers had reported that the structures, insofar as they affect the interests of navigation, are satisfactory; that there is a substantial power market in the area; that the three dams would utilize the head and stream flow in an economical manner; that the structures proposed to be constructed by Applicant would be safe and adequate; that Applicant's proposal could and would be operated to provide flood control storage and navigation benefits; that recreational facilities and opportunities would be provided; that Applicant's proposal would be economically feasible as power developments; that Applicant has the ability to finance the project; that other power sites would not be as

economical; and that no conflicting application was before the Commission.

Petitioners' major complaint apparently is not that the findings are not as *detailed* as Petitioners think they should be, but fundamentally, that the findings are *opposed* to what Petitioners think they should be.

(2) Regarding the second point, Petitioners' argument is based upon the fact that the Commission's staff, in its Brief before the Commission, compiled certain tables as to the comparative economics of the various plans proposed for the development of the stream.

It has never been contended by any one that the tables compiled by Staff counsel were anything more than argument. All the basic data as to costs, power capability, power output, etc., used in compiling the tables were *derived from the record.* The statistical data set out in the tables were simply presented as argument. Neither the staff experts nor any one else presented this data as evidence; nor is there any indication that the Commission considered it as such.

(3) Regarding the third point, the Commission's approval of plans was correct and forms no basis for certiorari. In accordance with finding (52) and Article 29 of the Commission's order and license (Apx. 54, 56), the Company, prior to commencement of any work at Brownlee and Oxbow, submitted revised" Exhibit L" general design drawings. Following prior approval by the Secretary of the Army and the Chief of Engineers (in accordance with Section 4(e) of the Act), these drawings were approved by the Commission by order issued November 3, 1955 (Apx. 62-63).

The only change involved was the substitution of an impervious earth core in the center of the rock-fill dam, instead of a concrete covering on its upstream face —the function of both being the same, to make the dam tight against water passage. This matter was gone into at great length throughout the hearing, with direct and unlimited cross-examination; and every engineer who testified on the subject stated that the earth core would be preferable to, and less costly than, the concrete face, if sufficient and suitable material could be found in the vicinity of the dams. No basic change in the nature of the project was in any way involved, and the "description and specifications of equipment" for the projects (Exhibit M) were not changed (*cf.*, Apx. 54, finding 54; Apx. 60, par. C).

Petitioners' statements that they "were given no opportunity for hearing or cross examination"; that the dams "were never disclosed in the applications or the hearings"; and that "The cost and economics of the dams finally approved have never been ascertained" (p. 30), are incorrect, and the record clearly so shows.*

Section 10(a) of the Act specifically provides that "the Commission shall have authority to require the modification of any project *and of the plans and specifications of the project works* before approval." Such modification was contemplated, after full consideration at the hearing, in the license itself (Apx. 54, 60). In view of the record, the Commission would have been remiss in its duty under the Act had it not provided for and authorized this modification of design.

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* Exhibits 107-115 (showing drawings, cost comparisons, and detailed cost estimates for all three dams with impervious cores), R., vol. 6, transcript pages 19912-19924.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I

Legislative History of Hells Canyon Bills Before Congress

In February 1950, the Secretary of the Army transmitted to Congress an eight-volume report of the Chief of Engineers, which he described as an exhaustive "review of reports on, and preliminary examination of surveys of the Columbia River and its tributaries" (H. D. 531, 81st Cong., 2nd Sess. (1950), T., vols. 93-100).

Likewise, in February 1950, the Department of Interior, Bureau of Reclamation, submitted to the Congress a voluminous two-volume report, including its suggested plans for the development of the Hells Canyon stretch of the river. (H. D. 473, 81st Cong., 2nd Sess. (1950); T., vols. 91-92).

On February 3, 1950, a proposed amendment to H. R. 5472 (81st Cong.), to authorize Hells Canyon and other projects, was transmitted by the Secretary of the Interior to Congress (T., v. 91, preface, p. 9), and introduced in the Senate as a Committee Amendment of the Senate Committee on Interior and Insular Affairs. Prior thereto, the subject matter had been considered in both House and Senate during the first session of the 81st Congress, and "to permit consideration of this amendment by the Interior and Insular Affairs Committee, it was agreed on the floor of the Senate on October 17 (C. R. 15096 and 15097) that consideration of the bill would be passed over until the second session of the Eighty-first Congress" (Senate Report No. 1351, v. 1, 81st Cong., 2nd Sess. 1950). As appears in the Senate Report, no less than eight bills were introduced to carry out the purposes of the proposed amendment to H. R. 5472.

The Committee Amendment to H. R. 5472 was called up in the Senate on April 10, 1950 (C.R. 4989-5194, 81st Cong., 2nd Sess.). After debate extending over several days, it was tabled by a vote of approximately 2-to-1 (C. R. 5190).

During the lengthy debate, several other amendments were offered to include authorization of a Federal dam at Hells Canyon, both alone and with other projects. All of these amendments were tabled, the last by a vote of approximately 4-to-1 (C. R. 5194). Before the final vote tabling the last of these amendments, one Senator was constrained to remark that "the Senate has acted twice on every one of these projects." (C. R. 5194)

In the 82d Congress, H. R. 5743, to authorize a Federal Hells Canyon project, was introduced on October 16, 1951. *The letter of transmittal from the Secretary of the Interior* (T., v. 101; p. 13, Hearings on H.R. 5743, Serial 20 (897 pages), 82d Cong., 2nd Sess. (1952)) *referred to the Company's pending license application and attached a copy of his letter of May 21, 1951 to the Commission commenting thereon.** An identical bill (S. 2812) was introduced in the Senate on March 7, 1952. At the conclusion of extended subcommittee hearings in the House of Representatives, the matter was indefinitely postponed by unanimous vote, and a motion to reconsider was laid on the table (T., v. 101; p. 736, Serial 20, *supra,* on H. R. 5743).

In the 83d Congress, a similar bill to authorize the Federal Hells Canyon dam, S. 1664 (T., 20681, Ex. 342), was introduced in the Senate on April 16, 1953; and three identical bills were introduced in the House (H. R. 4648, 4649 and 4650) on the same date. *Introductory speeches in both Houses referred at length to the pendency of the Company's FPC applications and its program of development* (C. R. 3205-23 and 3232-35).* Again Congress did not act.

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* These matters are mentioned, not only to make clear that Congress, as well as its Committees, had had a Federal Hells Canyon dam under consideration continuously since February 1950, *but also the fact that it was officially advised that the Company's license applications, and its plans for development of the Hells Canyon reach of the river, were pending before the Federal Power Commission for action.*

In the 84th Congress, on March 8, 1955, a similar bill was introduced in the Senate, S. 1333, and on the same date four identical bills were introduced in the House of Representatives. Extended hearings were again held, both by Senate and House Subcommittees (Senate Hearings on S. 1333, Hells Canyon Project, Idaho-Oregon, and Appendix, *1365 pages,* and House Hearing on H.R. 4719, 4730, 4739 and 4740, Serial No. 14, *523 pages,* 84th Congress, 1st Session). The House bills did not reach the floor.

S. 1333, after four days of full debate (C. R., July 13, 17-19, 1956), was defeated in the Senate by a vote of 51 to 41 (C. R., 7/19/56, p. 12994-12995).

In the 85th Congress, essentially identical bills have again been introduced (S. 555, and H.R. 5, 2840, 2866, 3079 and 3848).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., *et al.*,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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REPLY BRIEF FOR PETITIONERS

Neither the Government's brief nor that of Idaho Power Company denies the reasons cited by petitioners for granting the writ which, in accordance with Rule 19(b), relate to the importance of the statutory questions presented and the importance of the case to the

economy and future of the Pacific Northwest and the Nation as a whole.

The Company primarily argues the merits of the questions presented; it seems also to argue that the Commission's decision is entirely within its discretion and is, therefore, not subject to judicial review; but that, in any event, review would involve this Court in consideration of complicated technical factors reserved by Congress for expert determination by the Commission.

The Government makes a similar argument. In addition, it attempts to show that the decisions below are correct. In order to do so, however, the Government misrepresents the basic issue presented by petitioners, the purpose of the Federal Power Act, the function of the Federal Power Commission, and many of petitioners' contentions. The Government's brief contains still other erroneous and misleading statements. As to the issues raised other than under § 10(a) and § 7(b) of the Federal Power Act, the Government argues their merits.

Comments on these points follow, with particular reference to the Government's brief. In order that this Court may have the issues presented clearly before it when ruling upon the petition, the most patent of the Government's misstatements are noted below in point 4.

1. The New Interpretations of § 10(a) Now Advanced Constitute Additional Reason for Granting a Writ

The Government contends that the only comprehensive plan in existence for the Columbia River Basin (which it erroneously represents as being the Army's 1948 plan rather than the coordinated Army-Interior 1950 plan) is not even *prima facie* the comprehensive

plan that should have been used in the application of § 10(a) because the plan has not been approved or adopted by Congress (Govt. Br. 21-22)[1] This contention has never before been made by the Commission; in fact, it contradicts the lip service paid the so-called Main Control Plan in the Commission's decision below. This contention is advanced now for the apparent purpose of bolstering the decision of the Court below which, in an attempt to apply this Court's decision in *Roanoke Rapids,* 345 U.S. 153, erroneously assumed that all comprehensive river-basin plans are customarily presented by the Corps to Congress for approval or adoption (Pet. App. B 12, 15).

That is simply not the case and never has been for the Columbia River Basin. Instead, projects included in the Columbia Basin plan have been presented to Congress for individual authorization. Approval of the plan itself has never been requested.[2] Even more meaningful than bare approval or adoption of a comprehensive plan, petitioners submit, is Congressional implementation of the Columbia Basin plan to the extent of an ultimate Federal investment of at least $2.5 billion (Pet. 6, Fn. 1).

In order to justify its total rejection of the only existing comprehensive plan for the Columbia Basin, the Government says that the statutory licensing criteria are the beneficial public uses recited in § 10(a), and that the Commission's function is to determine whether a proposed project will be ". . . best adapted

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[1] The Company contends that a "comprehensive plan" must be "approved, adopted or *authorized*" (Emphasis supplied) (IPC Br. 2, 12).

[2] See H. Doc. 531, 81st Cong., 2d Sess., Vol. I, pp. VI, VII-IX.

to a comprehensive plan for the fulfillment" of such criteria (Govt. Br. 20; but see IPC Br. 10)

The intent of the Government's studied reversal of the sequence of the statutory language is not clear. Its effect would appear to be a serious de-emphasis of the concept of basin-wide comprehensive planning which has never before been challenged as the fundamental element of § 10(a).[1] If this interpretation is accepted as correct, the result must be a complete re-writing of the statutory language in derogation of the entire legislative history of the term "comprehensive plan", in effect permitting project-by-project development of a "plan" on an *ad hoc* basis, with no consideration to the over-all optimum development of the resources of a river basin.[2]

In any event, the urging of such a novel interpretation at this stage of this controversy clearly constitutes one more valid reason for the full consideration of the problem by this Court, which can only be obtained by the granting of the writ of certiorari requested by petitioners.[3]

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[1] This interpretation is contrary to that suggested by this Court in *Roanoke Rapids* (at 168-9).

[2] The importance of federal river-basin plans to the orderly administration of State laws is emphasized in the *amicus* brief filed in support of the petition by the State of Oregon, viz:

> "The Constitution reserves to the Federal Government paramount responsibility for comprehensive development of the Columbia Basin. Without authorization from the Congress, Oregon . . . cannot successfully assert effective control over reclamation, navigation and hydro-electric development on the Columbia and its tributaries." (Oregon Br. 7).

[3] The Company construes the statutory term "comprehensive plan" as meaning any adopted, authorized or approved "plan specifying a dam of any type or character in this [Hells Canyon] reach of the river." (IPC Br. 12).

2. The Contention That the Commission's Decision Is Not Reviewable Is Insupportable and Cannot Stand in the Way of a Writ

The Government asserts that the Commission's discretion under § 7(b) is unfettered by "detailed standards or criteria" and, accordingly, its refusal to make a recommendation to Congress for federal development was a decision reserved "solely for the judgment of the Commission." (Govt. Br. 14-16).[2]

This constriction of judicial review contravenes specific provisions of the Federal Power Act (16 U.S.C. 825 (1) (b)). The assertion of uninhibited authority under § 7(b) is without precedent. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, cited by the Government (Govt. Br. 16), as well as the authorities cited within that case, bore specifically on the question of the *constitutionality* of Congressional delegations of power conditioned on a statutory yardstick of "public convenience, interest or necessity," or simply "public interest". No such constitutional question is here presented. Moreover, the cited case points out that the naked language of a statutory standard does not serve as the sole limitation on administrative action (at 326):

> "The purpose of the Act, the requirement it imposes and the context of the provision . . . show the contrary."

New York Central Securities Corp. v. *United States,* 287 U.S. 12, considered controlling in *National Broadcasting Co.* v. *United States, supra,* recognizes the legislative objective as a fixed limitation on adminis-

[2] The Company seems to take this position not only as to § 7(b) but as to § 10(a) too (IPC Br. 9-11).

trative action, and thus further refutes the contentions that the Commission's discretion has in some way been enlarged to that.

The Government's very reliance on authorities such as these underscores the need for a determination by this Court of the meaning of the statutory priority for public development incorporated in § 7, specifically the priority for federal development in § 7(b).

Pointing to the "complex, specialized and highly technical" factors involved in the Commission's decision, the Government again—in still another way—attempts to enlarge the Commission's authority under § 7(b) into uncontrolled license and correspondingly to delimit the scope of judicial review (Govt. Br. 15).[1] Even if there were merit in the argument that the technical factors underlying the Commission's decisions were too complex for the courts, the fact is that petitioners are not asking this Court to review the technical and other factual determinations below. All that is requested is that the Court correct the erroneous statutory interpretations below.

3. The Commencement of Construction of Brownlee Dam Is Not a Valid Consideration in the Disposition of the Petition

The Government seems to argue—albeit obliquely—that this case is virtually mooted because the Company allegedly has already expended $15 million at the Brownlee dam site. Petitioners are frankly disturbed that the Federal Government should attempt to inject into this case new testimony outside the record, in the form of a gratuitous and wholly insupportable state-

[1] And see IPC Br. 7-9.

ment, in a footnote, to the effect that the Brownlee project is already 40% complete (Govt. Br. 12, Fn. 10).[1] Not even the Company makes this claim.

However, the jurisdiction of this Court to review the decisions below cannot be defeated by the Company's headlong race with the judicial process (see Pet. 9). Cf. *South Carolina Public Service Authority* v. *Federal Power Commission,* 170 F. 2nd 948, cert. den. 336 U.S. 953; *Baltimore & Ohio Railroad Company* v. *United States,* 264 U.S. 258.

4. The Government's Attempted Justification of the Decisions Below Is Predicated on Misrepresentations of the Basic Issue Presented, the purpose of the Act, the Function of the Commission and Petitioners' Contentions, and on Other Erroneous or Misleading Statements

The Government misrepresents the basic issue in this case as being federal vs. non-federal development (Govt. Br. 15, 18). Petitioners have never made this contention. The Government's characterization is a distortion of the real issue—full multi-purpose development of water resources vs. wasteful underdevelopment (Pet. 2-3, 10, 18, 20-21, 24-27)—and a distortion most inclined to bring false ideological issues into the controversy.

Petitioners favor the high dam because it means maximum development. Petitioners oppose the three-dam plan, not because it is proposed for non-federal development, but because it means under-development,

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[1] An expenditure of $15,000,000—even if this allegation is accurate—obviously could not result in 40% completion of a dam estimated by the Company to cost $63.5 million and by the Commission staff, $87.8 million.

in contravention of the whole purpose and spirit of the Federal Power Act. The Government's formulation of the basic issue can be refuted simply by pointing to the immense diversity of the founders and members of the National Hells Canyon Association, Inc. (see Pet. 7); their only common characteristic is a sincere interest in the full development and true conservation of the great water resources of the Pacific Northwest.

The purposes of the Act are also misrepresented by the Government. They are erroneously described as seeking to encourage the "comprehensive development of *power* resources" (Emphasis supplied) (Govt. Br. 14). On its face, the Act seeks multi-purpose development, not merely power resource development.

Moreover, the Government overstates the Commission's function in the field of water resources development. Rather than being the agency solely responsible for the development for hydroelectric production, as the Government would seem to want this Court to believe (Govt. Br. 22), the Commission is merely a participating agency, along with several other Federal, State and local agencies, in the preparation of comprehensive multi-purpose river basin plans (see Pet. 12-13). Primary responsibility for these plans rests with the Corps of Engineers and to some extent with the Bureau of Reclamation. Nor is it the function of the Commission "to formulate . . . general power policy", as the Government asserts (Govt. Br. 22). If, in fact, the Commission believes that it has this function, it is admittedly invading the legislative field and its decision here all the more requires review by this Court.

In important respects, the Government misrepresents the petitioners' contentions. Thus, it presumes that petitioners accept the Commission's findings as to the comparative merits of the three-dam and high dam proposals (Govt. Br. 13). Petitioners do accept such findings of the Commission—as far as they go. But where these findings do not disclose quantitative differences—as in the case of power output; or the range of quantitative differences—as in the case of flood control benefits; or where findings are lacking—as with respect to most of the indirect economic benefits, petitioners look to the unrefuted findings of the Presiding Examiner.

The Government also misrepresents the specific issues raised by petitioners under § 10(a) and § 7(b). It asserts that petitioners are questioning the adequacy and clarity of the standards in § 10(a) and § 7(b), whereas, as is plain from the petition, petitioners are questioning the propriety of the interpretations of these standards below (Govt. Br. 14, 19; Pet. 17-18, 23).[1]

Other erroneous or misleading statements contained in the Government's brief include the following:

1. ". . . the construction by the United States of a high Hells Canyon project as *suggested* in 1948 by the Army Corps of Engineers . . ." (Emphasis supplied) (Govt. Br. 4).

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[1] See also IPC Br. 2, 11, 14. To decide these questions of statutory interpretation does not require that this Court either legislate or tell the Commission what its judgment should have been under § 10(a) and § 7(b), as the Company contends.

The high Hells Canyon dam was specifically *recommended* for congressional authorization by the Secretaries of Army and Interior in 1950 (Govt. Br. 21-22).

2. "Accordingly, the Commission concluded that *the objects* (sic) of the main control plan could be achieved 'by a number of different combinations of projects . . .' " (Govt. Br. 6-7).

The Commission's conclusion that the objectives of the Main Control Plan could be achieved "by a number of different combinations of projects . . ." related solely to the flood control objective. It held out no such solution for other objectives of that phase of the ultimate comprehensive plan, and *especially not for the power objective* (Pet. App. 28; IPC Br. 5; Pet. 16).

3. "In this regard, the Commission adverted to the estimates of record showing that the output of the three developments would be fully utilized in Idaho Power's own system by about 1975." (Govt. Br. 11).

The brief fails to mention the Commission's conclusion that one of the three dams may never be built for lack of a market in the Company's service area (Pet. 11, 27; Pet. App. C 39).

4. "Since petitioners did not initially request the court to stay the Commission's orders, Idaho Power proceeded with the construction of the Brownlee dam." (Govt. Br. 12, Fn. 10).

The causal connection implied by the Government is conjectural and unsupported. The Company's own explanation is different (IPC Br. 4; see also Pet. 9).

5. "But these findings, either alone or together with the accompanying opinion of the Commission, reveal

beyond any doubt that the Commission found that the high dam produced greater benefits *solely* in the area of flood storage capacity and that, in other respects, the difference was either too slight to consider (Fdgs. 12, 14, 17, 21) or, in the case of power production, the incremental energy production of the high dam would cost as much to produce as it would be worth (Fdg. 18) . . ." (Govt. Br. 13, Fn. 11).

This statement obscures the substantial differences in the quantity of power benefits from the three-dam and high dam proposals and does not deny that the attainment of the greater power benefits from the high dam is economically feasible by federal standards (Pet. 6-7).

6. "As enacted, and as administered for over 35 years, the Act seeks to encourage the *immediate and* comprehensive development of *power* resources by public or private agencies under such regulation as to protect every *legitimate* public interest. The *Roanoke Rapids* case, 345 U.S. 153, 168." (Emphasis supplied) (Govt. Br. 14).

Neither the legislative nor the administrative history of the Act point to a sacrifice of comprehensive development in favor of immediacy; as already noted, the Act seeks multi-purpose development, not solely power development; what public interest, if any, was intended to be excluded by the phrase "every legitimate public interest", is not indicated. *Roanoke Rapids* is not authority for the Government's contentions (See Pet. 15, 22-23).

7. "In dealing with the *comparable contention* in *Roanoke Rapids* . . . this Court wrote . . ." (Emphasis supplied) (Govt. Br. 15).

The contention before the Court in *Roanoke Rapids* where the private project virtually matched the proposed federal project, cannot in any sense be considered comparable to that made herein, where the differences between the contending proposals constitute the very basis of this controversy (Pet. 21, 23; Pet. App. E 153).

8. "The Commission has recommended federal development to Congress under Section 7(b) only once . . ." (Govt. Br. 15, Fn. 12).

The Government fails to explain that prior to this case the Commission has passed on very few license applications for construction of lesser projects in conflict with multipurpose projects proposed for federal construction.

9. "Petitioners argue that the substantially higher cost of high Hells Canyon, as compared to the three-dam proposal, *should not have been considered* . . . petitioners forget that cost is a necessary element in determining the cost-benefit ratio, the market potential, and the relative economic feasibility of the projects to be compared. Section 7(b) certainly did not contemplate that the Commission would recommend *economically impractical* projects and thereby advise the dissipation of public monies." (Emphasis supplied) (Govt. Br. 17; IPC Br. 7-8).

Correctly stated, petitioners' position is that the comparative capital costs of the two proposals are irrelevant where both proposals are economically feasible—a conclusion which necessarily reflects the fact that the substantially higher cost of the high dam is justified by its substantially larger revenue-producing (i.e. power) benefits. Nowhere before has the Gov-

ernment contended that the high dam was economically impractical. The Commission's licensing order, in fact, finds the contrary (Pet. App. C 36, 50, Fdg. 18; see also E 142-44).

10. ". . . petitioners appear also to urge that *controlling* significance should have been afforded to the alleged fact that federal financing would have better served certain broad economic purposes . . ." (Govt. Br. 18; IPC Br. 8).

Petitioners refer to the benefits from lower cost federal power only as "significant factors" to be weighed as "public purposes" (Pet. 18; see Pet. App. C 26).

11. ". . . these indirect benefits would result not from the alleged superiority of the high Hells Canyon project but rather from the superior credit and tax position of the Government . . ." (Govt. Br. 19, Fn. 16).

The indirect benefits of which the Commission took note, as well as others found by the Examiner, are not the result alone of the "superior credit and tax position" of the Government but also of the larger quantity of power that would be available (Pet. 7).

12. ". . . the recommendations of the Army Engineers were themselves modified by the Bureau of Reclamation of the Department of the Interior (Govt. Br. 21-22).

The "modification" referred to was not unilateral action, but joint agreement of the Secretaries of the Army and the Interior pursuant to Presidential directive (Pet. 14, Pet. App. E 124-125, 158, Fdgs. 58, 61).

13. ". . . since Congress first authorized the Corps of Engineers to prepare comprehensive plans in 1927 (see Pet. 13), it could hardly have referred to the plans so prepared, or intended them to be binding upon the Commission, when it enacted the Federal Water Power Act in 1920 and first used the term 'a comprehensive plan' " (Govt. Br. 22).

The legislative history of the Act makes abundantly clear that in 1920 the Congress did contemplate the preparation of such plans for the guidance of the Commission (Pet. 13).

14. "It is the Commission, not the Corps of Engineers, which Congress established as its 'permanent disinterested expert agency' *to formulate* and carry out general power policy. 345 U.S. at 167, 168 . . ." (Emphasis supplied) (Govt. Br. 22-23).

This statement misrepresents the enclosed quotation from the *Roanoke Rapids* decision. The exact quotation reads: "the permanent disinterested expert agency of Congress to *carry out* these [water-power] policies" (Emphasis supplied).

15. "This is not to say that substantial weight was not attached, in this case, to the recommendations of the Corps of Engineers" (Govt. Br. 23).

The implication that substantial weight was given by the Commission and the court below to the so-called Main Control Plan and its multi-purpose objectives is erroneous (Pet. 12, 16).

16. ". . . the three-dam plan . . . could *substantially equal* the benefits of the high dam in *every other* respect, would provide *somewhat less* storage capacity for flood control purposes" (Emphasis supplied) (Govt. Br. 23).

In its licensing decision, however, the Commission thought the storage differential between the two projects was sufficiently large to warrant the statement that "an additional amount of flood control storage would have to be provided elsewhere" (Pet. App. C 28-29); also, the Court below referred to the ". . . public benefits in somewhat greater quantity . . . " from the high dam (Pet. App. B 14; and see Pet. 16).

17. "On the whole, the Commission was 'convinced that the immediate construction of the Brownlee project would be consistent with the Army's *present* plans' " (Emphasis supplied) (Govt. Br. 23).

In juxtaposition to the immediately preceding sentence, this statement erroneously implies that the Army's present plans (in terms of quantitative multipurpose objectives) are different from its so-called Main Control Plan. The objectives of that plan have not been modified (See Pet. App. E 160, Fdg. 69).

18. ". . . it is a common practice to compare alternative proposals on this basis [of identical financing] and, in fact, such comparisons were utilized by the Corps of Engineers . . ." (Govt. Br. 25).

This is common practice only when comparing alternate proposals for Federal development; there is no precedent for such comparison for purposes of § 10(a) (See Pet. App. E 140-42).

19. "Once a decision has been made against recommending federal construction under § 7(b), the determination under § 10(a) must necessarily be in terms of private development and the attainment, on the basis of private financing, of those fundamental engineering objectives subsumed in the requirement of comprehensive development" (Govt. Br. 25).

Any implication from the context that the Commission's determination under § 10(a) relied on a comparison based on private development is erroneous (Pet. 11-12; Pet. App. C 31-32, 34, 36, 50, Fdg. 18).

5. The Government's Position on Other Questions Presented Misconstrues Petitioners' Contentions, Misrepresents the Facts and Misapplies the Law

a. The Government's position regarding the issue under § 13 of the Federal Power Act is contrary to fact and law (Govt. Br. 26; Pet. App. B 17-18, C 39-40; Pet. 28).

b. The Government's position regarding the Commission's failure to make the findings necessary to satisfy § 8(b) of the Administrative Procedure Act misconstrues petitioners' contention and is contrary to law (Govt. Br. 27-28).

Petitioners' contention is simply that conclusions necessary for adequate judicial review are not to be found in the licensing order. The significance of these missing findings cuts far deeper than any failure to include in the order supporting evidence for the findings made (Pet. 28-29). The cases cited by the Government, in fact, support rather than refute petitioners' contention. See *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 525; *Capital Transit* v. *United States*, 97 F. Supp. 614, 621.

c. The Government's position regarding the alleged violation of § 7(d) of the Administrative Procedure Act seems to confirm petitioners' contention in the very process of trying to refute it. Thus the Government's brief says: " . . . the 'adjusted' analyses of the evidence . . . were merely analyses of record evidence *plus appropriate adjustments* . . . "(Emphasis

supplied) (Govt. Br. 28). In apparent contradiction of itself, the Government also says: "In utilizing these 'adjusted' analyses, the Commission did not go outside the record, since *all data* utilized by it are *from the record*" (Emphasis supplied) (Govt. Br. 28).

The assertion that petitioners could not have been prejudiced by such an excursion beyond the record is erroneous. Regardless of the effect of the "adjusted" analyses on the economics of the high dam, they simultaneously colored the economics of the 3-dam proposal.

d. The Government's argument as to the *ex parte* post-license order of November 3, 1955 fails to explain that petitioners had been intervenors in the proceedings for fully two years at the time of the filing of the drawings; and that nevertheless they were denied even service of copies of these revised drawings (Pet. 29-30; Pet. App. D).

CONCLUSION

For the foregoing reasons, additional to those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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Washington 6, D. C.

March 27, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of April 1, 1957, denying the petition for writ of certiorari, 353 U.S. 924, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the petition filed February 14, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Since the filing of the petition for writ of certiorari herein, a series of events has occurred which throws new light on the weakness of the decision below as it affects the licensing standard of § 10(a) of the Federal Power Act, the vitality of the national conservation policy for water resource development and its orderly administration.

1. On March 28, 1957, the Senate reaffirmed the mandate of Congress, embodied in § 10(a) of the Federal Power Act and other federal statutes,[1] that comprehensive plans for multipurpose development of the Nation's waterways must adhere to maximum feasible basin-wide goals (S. 497, 85th Cong., 1st Sess., Sec. 203; 103 *Cong. Rec.* (unbound) 4111 *et seq.*). The bill now awaits House action. Referring specifically to the comprehensive plan for developing the Columbia River and its tributaries, prepared by the Corps of Engineers and first reported to Congress in 1950, this new directive instructs the Corps as follows (S. 497, 85th Cong., 1st Sess., p. 44):

> "In carrying out the review of House Document Numbered 531, Eighty-first Congress, second session, and other reports on the Columbia River and its tributaries, pursuant to the resolution of the Committee on Public Works of the United States Senate dated July 28, 1955, the Chief of Engineers shall be guided by flood control goals not less than those contained in said House Document Numbered 531."

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[1] E.G., 44 Stat. 1010, 1015; and see Report of President's Water Resources Policy Commission, 1950, Vol. III, chap. 9.

The flood control goals of the 1950 plan included, for the current phase of development, 27 million acre-feet of usable storage, of which 21 million would be required barely to cope with a particular historical flood pattern. Facilities that could provide such storage would be useful, of course, not only for flood control, but for power development, recreation, navigation and other beneficial public uses contemplated in the plan.

The Court below rejected the contention that Congress intended the goals of the 1950 coordinated comprehensive plan to serve *prima facie* as the standard of proper development for the Columbia Basin. The Court approved a license that would sacrifice 2.88 million acre-feet (or three-fourths) of the potential storage at Hells Canyon, all of which is needed to achieve the flood control and other plan goals. The new directive passed by the Senate reinforces the contention which the Court below rejected. By the same token, it reinforces the petition for writ of certiorari.

2. The failure of the decision below clearly and simply to rule on the meaning of a "comprehensive plan" has resulted recently in such confusion among the three Government agencies chiefly concerned with water resource development as to threaten administrative chaos. Orderly administration in this important field, affecting vital regional and national interests, warrants more clearly than heretofore a review and clarification of the decision below.

(a) On February 14, 1957, the Secretary of the Interior released a letter to the Chairman of the Federal Power Commission, advising that he had ordered the Bureau of Reclamation to make further studies

of a storage project at Pleasant Valley (downstream from Hells Canyon in the Middle Snake) that would inundate one or possibly two of the damsites licensed to Idaho Power Company. The Secretary estimates that $73,500 is to be spent on these studies in the fiscal year 1957 and another $132,500 in 1958.

Petitioners contended that one of the three Idaho Power dams might never be built and that the remaining two dams could not begin in any way to measure up to the statutory standard. The disposition of this fundamental contention by the Court below is so unclear that the Secretary of the Interior now proposes to spend $206,000 of federal funds in studying a storage project that would preclude one or even two of the three Idaho Power dams.[2]

(b) Following the Secretary's announcement of the new study by the Bureau of Reclamation, the Corps of Engineers has likewise undertaken to re-study the Middle Snake. Its program includes further investigation of a multi-purpose storage project at Nez Perce, downstream from Hells Canyon, that would inundate the project at Pleasant Valley now under study by the Bureau of Reclamation. The Corps is budgeting more than $400,000 for its over-all basin study in the fiscal years 1957 and 1958.[3]

The Nez Perce project was proposed in the 1950 coordinated comprehensive plan as part of the next phase of development following the phase in which the high Hells Canyon project would be constructed.

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[2] "Hells Canyon Project, Idaho-Oregon", hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Intererior and Insular Affairs, U.S. Senate, 85th Congress, 1st Session on S. 555, March, 1957, pp. 85-86, 140-141, 143, 154-158.

[3] *Ibid.*, pp. 250-251.

The irreconcilability of the new Corps study and the new Bureau study is further evidence of the current confusion. By casting doubt on the long-established concept of comprehensive development, the Court below has opened an administrative Pandora's box.

(c) In a recent license proceeding affecting the Middle Snake, the Staff of the Federal Power Commission recommended on March 15, 1957 that the Commission deny a license application for a project below Hells Canyon that would preclude construction of the Nez Perce project.

This Staff recommendation was based on a recognition of the need for additional storage in the Middle Snake. The irreconcilability of this position with the Staff position and the Commission decision in the Hells Canyon case, which ignored the need for such storage, further demonstrates that the Court below has left even the agency administering the Federal Power Act without adequate—albeit necessary—guidance.[4]

In summary, this test case, which should have produced some judicial direction for orderly administration in an important area of public law, has produced only confusion bordering on chaos.

3. In *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 155 (sometimes called the *Roanoke Rapids* case), this Court granted review on the ground that the case involved "a conflict of view between two agencies of the Government having duties in relation to the development of national water resources"; the Court further noted that a determination of the issues "may affect a substantial number of important potential sites for the development of hydro-electric power".

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[4] Pet. App. 28-29.

In that case the conflict of view was between the Federal Power Commission and the Interior Department, principally on the narrow question whether a particular project proposed in a comprehensive plan of the Corps of Engineers should be federally or privately developed. Here the differences in view that have appeared since the filing of the petition for writ of certiorari involve all three of the principal agencies concerned with water resource development; and they involve questions far broader and deeper than those in the *Roanoke Rapids* case—questions probing the very concept of comprehensive development. The determination of these questions will affect, even more assuredly and pervasively than in the *Roanoke Rapids* case, "a substantial number of important potential sites for the development of hydro-electric power".

4. The foregoing problems relate exclusively to the interpretation and application of the licensing standard contained in § 10(a) of the Federal Power Act. Accordingly, this petition presents issues which can be determined without reference to the problems of federal-versus-non-federal development that have arisen under § 7(b) of the Act. Petitioners respectfully suggest that, if the Court were to limit its review here to the issues under § 10(a)—the novelty and importance of which are undisputed—the Court could make a most significant and salutary contribution to the law of water resource development. Without a definitive and, above all, a clear and intelligible construction of the statutory licensing standard as applied to the facts of this test case, the law in this field will remain obscure, and its administration thereby virtually sealed against effective judicial review.

If the Commission license to under-develop the resources at Hells Canyon, one of the country's greatest

natural multi-purpose damsites, can be sustained without more searching inquiry and analysis than that provided by the Court below, the Commission can justify any degree of under-development anywhere. Perhaps never before has an administrative agency been left with such unregulated power to defeat the very purposes for which it was created.[5]

It took 20 years of struggle and compromise to establish the national policy of maximum feasible multi-purpose development of the country's river systems, reflected in the Federal Power Act and specifically § 10(a). Without a clarifying opinion by this Court, Congress will be left not merely with the question whether federal development at Hells Canyon is necessary to implement this national policy, but with the much larger question, whether the policy itself must be reformulated to assure its effectuation. If the Act has failed in its purpose, and if it should take another period of years to reestablish the policy, there may be few if any multi-purpose damsites left to protect against the relentless drive of single-purpose power interests.

It is difficult to conceive of a case that could present any greater need for the exercise of this Court's supervisory judicial function.

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[5] See § 10 of Administrative Procedure Act, 60 Stat. 243; cf. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

EVELYN N. COOPER
LUCIEN HILMER
Counsel for Petitioners
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Washington 6, D. C.

April 26, 1957

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

EVELYN N. COOPER

MOTION FILED MAY 9 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENT
and
SUPPLEMENT TO PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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1025 Connecticut Ave., N. W.
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May 9, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners move this Court for leave to file the accompanying Supplement to Petition for Rehearing of the Order Denying Petition for Writ of Certiorari in this cause.

In support of this motion, petitioners cite the fact that the Office of Defense Mobilization has recently issued necessity certificates for accelerated amortization for two of the three Idaho [illegible]ver Company proj-

ects approved by the decisions below. This action, described in the Supplement as constituting a separate and distinct basis for this Court's review and action, was not recorded in any official journal and did not become known to the petitioners until reports of it appeared in the Washington press on the morning of April 26, 1957—the last day for filing the Petition for Rehearing under this Court's Rule 58-1. Petitioners submit that the cost to the Federal government resulting from this action of the Office of Defense Mobilization constitutes an intervening circumstance of substantial effect in view of the stated opinion of the Federal Power Commission, affirmed by the Court below, that the 3-dam project licensed by the Commission order would be constructed at no cost to the United States. Petitioners further submit that this intervening circumstance has not heretofore been put before the Court in this cause.

Petitioners motion for leave to file the Supplement seeks to place before this Court a significant intervening event which invalidates a major premise of the decision below, and emphasizes the need for this Court's review and remedial action.

Respectfully submitted,

EVELYN N. COOPER
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Counsel for Petitioners
1025 Connecticut Ave., N. W.
Washington 6, D. C.

May 9, 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENT TO PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners renew their prayer contained in the petition for rehearing filed April 26, 1957, and hereby separately pray that in light of the intervening circumstance described below the Court grant relief appropriate thereto by issuing a writ of certiorari and, without further proceedings in this Court, reversing the judgment of the Court below, with instructions that it remand the cause to the Federal Power Commission for further proceedings to consider the new circumstance.

ADDITIONAL REASON FOR GRANTING REHEARING AND ISSUING THE WRIT

On April 26, 1957, the day petitioners filed their petition for rehearing herein, it was reported in the Washington press that the Office of Defense Mobilization had issued certificates of necessity for accelerated tax amortization for two of the three Idaho Power Company projects licensed by the Commission decision below.[1] Pertinent excerpts from the official press release of the Office of Defense Mobilization are appended hereto.

This new development constitutes a separate and distinct basis for review and action by this Court. It invalidates one of the chief grounds on which the Commission based its judgment and decision, under § 7(b) of the Federal Power Act, that the water resources of Hells Canyon should not be developed by the United States. The Commission decision, affirmed by the Court below, relied heavily on the proposition that the public purposes to be served by the Idaho Power projects, although less than those attainable from the federal high dam project, "will be realized without expense to the United States"—that benefits from the Idaho Power development would be provided "at no cost to the United States" (Pet. App. 36).[2]

It now appears that the licensed projects will entail substantial cost to the United States and its taxpayers.

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[1] Washington Post and Times Herald, April 26, 1957, p. A-2.

[2] The Commission was aware that applications for accelerated tax amortization were pending with ODM, but apparently assumed that they would not be granted. ODM was on notice of the FPC decision and the reasons for it, but nevertheless admittedly withheld action on the applications until after the Supreme Court order of April 1, 1957 denying the petition for certiorari (see Appendix, *infra*).

The cost to taxpayers attributable to the accelerated tax amortization will amount, as shown below, to not less than about $29 million, or not less than 28 per cent of the Company's estimated cost of the two certificated projects. The cost to taxpayers could be on the order of $97 million or about 94 per cent of the Company's total estimated cost of the two certificated projects.

This intervening circumstance is of substantial effect. It destroys one of the principal grounds of the Commission decision. What effect the new circumstance would have upon the Commission's judgment under § 7(b) cannot be ascertained without further Commission proceedings and consideration, since the judgment required by § 7(b) is expressly reserved to the Commission. *Connecticut Light & Power Company* v. *Federal Power Commission,* 324 U.S. 515 (1945); *Chenery Corporation* v. *Securities and Exchange Commission,* 318 U.S. 80 (1943); *Pottsville Broadcasting Company* v. *Federal Communications Commission,* 98 F. 2d 288 (1938).

The certificates for accelerated amortization apply to 65 per cent of the cost of Brownlee dam and 60 per cent of the cost of Oxbow dam. On the basis of the Company's cost estimates of $67,138,240 and $35,932,130, respectively (deemed low by the Federal Power Commission), these percentages would amount to $43,639,856 and $21,559,278, respectively, or a total of $65,199,134. The Office of Defense Mobilization certificates would enable Idaho Power Company to depreciate this sum at the rate of 20 per cent per year for five years, rather than at the normal rate, and to deduct corresponding amounts from its taxable income.

Over the five-year period, the special deductions thus allowed would amount to approximately $58,679,221.[3]

Based on the Company's normal tax rate of 52 per cent, the special deductions will reduce the Company's taxes over the five-year period by a total of about $30,513,195. According to the Federal Power Commission, such tax savings are equivalent to an "interest-free loan" by the United States Government to the certificate holder.[4]

After the fifth year, and over the succeeding 45 years, when the total investment will presumably be depreciated, the Government will receive back in small annual instalments, and without interest, the $30,513,195.[5] But, meanwhile, if the Treasury is to be restored to a condition approximating that which would have prevailed in the absence of the fast tax write-off, the Government will have to make up this amount (less the gradual repayments) by increasing taxes of others or by borrowing.[6] The cost to the tax-

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[3] I.e., the difference between the accelerated depreciation ($65,199,134) and normal depreciation ($6,519,913), assuming the latter at the rate of 2% per year. The license period is 50 years.

[4] Federal Power Commission Opinion No. 264, *In the matter of Treatment of Federal Income Taxes as Affected by Accelerated Amortization*, Docket No. R-126, issued December 4, 1953, p. 3.

[5] Assuming tax rates remain unchanged over the 45-year period. The repayments would be in the form of slightly increased annual tax payments; the residual depreciation charges will be less than normal, and taxable income will be increased accordingly.

[6] See "A Report on 5-year Amortization of Emergency Defense Facilities under Section 168 of the Internal Revenue Code of 1954", Committee Print, Joint Committee on Internal Revenue Taxation, December 1956, pp. 12-13; also statement by Secretary of the Treasury, George M. Humphrey, before Senate Finance Committee on S. 1795, May 7, 1957; see Washington Post and Times Herald, May 8, 1957, p. A-2.

payers of the interest-free loan will accordingly amount to not less than the Government's cost of borrowing the money.

Assuming a cost of 2 per cent compounded annually on the unpaid balance, (recent interest rates on long-term Government debt are over 3 per cent), petitioners estimate that over the 50-year period of the license, and giving effect to gradual repayments by the Company as aforesaid, the cumulative cost to the United States Treasury would be of the order of about $29 million. At a compound interest rate of 3 per cent, the cumulative cost to the United States Treasury would be of the order of $97 million.

The foregoing calculations are offered not as precise measures, but as an indication of the possible magnitude of the cost of the two certificated Idaho Power projects to the United States Treasury, the lower of the two figures being very conservative.

The petition for rehearing, filed April 26, 1957, urged grounds relating exclusively to § 10(a) of the Federal Power Act. It contemplated the possibility of a review limited to the issues under that section, without reference to the issues under § 7(b) of the Act. The additional ground for review set forth in this supplement, however, inescapably concerns the Commission decision under § 7(b).

It now appears that two of the three Idaho Power projects will entail a cost to the United States of at least $29 million and possibly as much as $97 million. This new fact is so plainly inconsistent with one of the major premises of the Commission judgment and decision, affirmed by the Court below, as to constitute a separate additional ground for rehearing and review.

CONCLUSION

For the reasons set forth above and in the petition for rehearing, filed April 26, 1957, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

As to the ground set forth in this supplement, petitioners submit that upon granting review, and without further proceedings in this Court, the judgment below should be reversed, with instructions to the Court of Appeals to remand the case to the Federal Power Commission for further administrative proceedings and consideration in light of the substantial intervening development.

Respectfully submitted,

EVELYN N. COOPER
LUCIEN HILMER
Counsel for Petitioners
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Washington 6, D. C.

May 9, 1957

Certificate of Counsel

I hereby certify that the foregoing Supplement to Petition for Rehearing of the Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

EVELYN N. COOPER

APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF DEFENSE MOBILIZATION
WASHINGTON 25, D. C.

Advance Release for AM's
Monday, April 29, 1957

No. 581
Certificates of Necessity

Certificates of necessity for accelerated tax amortization for 27 new or expanded facilities amounting to $197,363,693 were issued by the Office of Defense Mobilization in the two-week period from April 4, 1957, through April 17, 1957, it was announced today.

ODM emphasized that the accelerated tax amortization certified by the agency represents investment of private capital and does not involve the investment of Government funds.

Among the certificates issued were two for Idaho Power Company. In August 1953, the Company filed two applications for necessity certificates which would provide for accelerated tax amortization, on two proposed power developments on the Snake River at Brownlee and Oxbow, Oregon-Idaho. Cost of the Brownlee project was estimated by the company at $67,138,240 and of the Oxbow project at $35,943,730.

On August 4, 1955 the Federal Power Commission granted licenses covering the two projects.

In accordance with then applicable procedures and criteria, established by the ODM, the Department of the Interior on October 25, 1955 recommended that necessity certificates be issued on both projects.

The construction of the projects was started in 1955 and in accordance with established procedure their power capability was charged against the electric power expansion goal which was open at that time. However, issuance of the certificates was withheld pending settlement of litigation, which involved the FPC's approval of the projects. This litigation was terminated by action of the Supreme Court on April 1, 1957.

Necessity certificates for both projects were issued by the ODM on April 17, 1957. Brownlee was certified for 65 percent of its cost; Oxbow for 60 percent.

ODM reported that of the 27 certificates issued, 5 are for facilities involving small business. The estimated cost of the facilities is $719,133. ODM gives special consideration to those projects to encourage small defense plant expansion.

With the certificates announced today, accelerated tax amortization amounting to $37,834,398,000 has now been granted for 21,867 new or expanded facilities. ODM explained that the dollar value given refers to the face value of the certificates. Of this amount, which is the estimated cost of the facility stripped of such extraneous items as the cost of the land, only a certain percentage may be depreciated at the rapid rate. Thus of the amount certified for accelerated amortization so far, 60 per cent or $22,855,890,000 is eligible for rapid depreciation.

The main purpose of the amortization program is to expand private industry's productive capacity to meet mobilization goals. Unlike the situation during World War II, Government ownership of defense facilities during this emergency period is being held to a minimum.

The accelerated tax amortization program is provided for in Section 168 of the 1954 Internal Revenue Code. This section permits a tax write-off of a portion of a capital investment in defense facilities over a five-year period. The normal period for such write-offs would be 20 years or longer. The portion of the investment subject to tax write-off is determined by ODM and depends among other factors, on the type of facility, the amount of expansion required for the emergency, the probable usefulness of the plant for other than defense purposes after the emergency, and the degree of financial aid necessary as an incentive to encourage the expansion.

The list of certificates follows:

CERTIFICATES OF NECESSITY NO. 581

Name of company and location of facilities	Product or service	Amount certified	Percentage allowed
* * *	* *	*	*
Idaho Power Company[2] Baker County, Oregon & Adams County, Idaho	Electric power generating facilities	$35,932,130	60
Idaho Power Company[2] Baker County, Oregon & Washington County, Idaho	Electric power generating facilities	67,138,240	65

[2] Transactions dated April 17, 1957.

FILE
FEB 14 19
JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR ISSUANCE OF THE WRIT

ROBERT Y. THORNTON
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Salem, Oregon

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

NATIONAL HELLS CANYON ASSOCIATION, INC., *et al*,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR ISSUANCE OF THE WRIT

INTEREST OF THE STATE OF OREGON

The interest of the State of Oregon in the questions presented in this case is dual, economic on the one hand and governmental on the other.

Economic Interest

The greatest single existing and potential asset to the economy of the State of Oregon is the hydroelectric energy, reclamation and navigation potential of the Columbia River and its tributaries. Full-scale integrated development of the resource potential of the river system is the keystone to the future economic well-being of the inhabitants of this state.

Prior to large scale developments on the river and its tributaries, the economy of the state was, and to a considerable extent remains, lumber and agriculture based. Both such activities are highly seasonal in nature and productive employment therein fluctuates greatly throughout the year.

The availability of low-cost hydroelectric energy and abundant, pure water are the primary attractions offered by the state to industry. Commercial and industrial growth in the state in recent decades, particularly investment in metals and chemicals projects has tended very closely to parallel utilization of low-cost hydroelectric energy. Greater diversification of commercial activity made possible thereby has tended markedly to stimulate the economy of the state as a whole and has had the additional and highly beneficial effect of leveling out peaks and valleys in employment.

Even though it forms the backbone of commercial and industrial growth in the area, the Columbia in its natural state is at the same time one of the greatest threats to the economy of the region by reason of violent annual flooding. The ratio of peak runoff to average minimum flow is approximately ten to one. On a river the size of the Columbia, such a ratio is unusual and creates critical flood dangers. The tragedy of the

1948 Vanport flood is a solemn reminder of the power of the river to destroy the things that its otherwise beneficial qualities make possible. During 1956 the region narrowly escaped an equally extensive and potentially far more damaging flood.

The full potential of the river system is as yet less than one third realized, notwithstanding the extent of the existing investment. Maximum development of remaining sites and the integration of such development with existing facilities is of crucial importance to the state and to its people. The channeling of these economic problems within the confines of litigation concerning a particular project must not be permitted to minimize the relationship that each proposed project has to comprehensive development. Integration of each such project into the existing system for the coordinate purposes of reclamation, navigation and especially for flood control storage and power generation is an underlying factor that must not escape the court's attention.

The future economic health of the State of Oregon may hinge in large part upon the decision in this case. The concern of the state and of its people in such matters is so immediate and important that the court would be fully justified in taking judicial notice thereof. *U. S.* v. *Rumley,* 345 U.S. 41, 73 S. Ct. 543 (1953); *U. S.* v. *Reynolds,* 345 U.S. 81, 73 S. Ct. 528 (1953). This would be true even if the state were appearing in an adversary capacity. *State of Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 65 S. Ct. 716 (1945); *State of Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 27 S. Ct. 618; *Missouri* v. *Illinois,* 180 U.S. 208, 21 S. Ct. 331; *New York* v. *New Jersey,* 256 U.S. 296, 41

S. Ct. 492; *Kansas* v. *Colorado,* 206 U.S. 46, 27 S. Ct. 655; *Colorado* v. *Kansas,* 320 U.S. 383, 64 S. Ct. 176.

Governmental Interest

The Legislature of the State of Oregon through the years has enacted various statutes relating to the development of water resources, regulation of public utility rates and services, preservation of fish and game resources, licensing of hydroelectric projects, stimulation of hydroelectric energy development, and various other matters of general public concern.

These functions are, as they of necessity must be, carried on against the framework of federal activity in the same fields. The primacy of federal jurisdiction relegates state development and administration in such matters to a status ancillary to and, wherever possible, coordinated with, federal action.

The Federal Power Commission for a variety of reasons, mostly fiscal, has itself been unable actively to engage in full-scale comprehensive study and planning in connection with reclamation, irrigation, hydroelectric generation and flood control aspects of regional development. *City of Tacoma,* 10 FPC 424, 92 PUR NS 79 (1951). The Department of the Army, Corps of Engineers, and the Department of the Interior, Bureau of Reclamation, have long been actively engaged in large-scale regional studies and, from time to time, acting under specific authorizations from Congress, have published comprehensive plans for development and utilization of resources, flood control and related matters. As a result, both implicitly by these congressional authorizations and actually by long-standing custom, the responsibility for the preparation of such comprehensive plans has been exercised by these two agencies. The past practice of the Com-

mission has been to rely upon, and on occasion to specifically adopt, plans developed by its sister agencies.[1] The present case strongly suggests a departure from this long-standing practice.

In order to develop an effective program of state action in these areas, it is essential that the legislature of the state concerned have reasonably certain knowledge as to which federal agency is responsible for planning, and the extent to which other federal agencies may deviate from comprehensive plans once developed. Whenever a state, relying upon the existence of an approved comprehensive plan developed by either the Corps of Engineers or the Bureau of Reclamation, has expended money and constructed projects designed to coordinate with existing or proposed federal projects, the possibility that a separate agency of the federal government might have under its statutes latitude in the implementation of the plan sufficient to negate or render valueless all or a part of the state's existing or proposed program can cause economic stagnation. The same thing is true, of course, of the programs of state administrative bodies which have been given responsibility for such matters by existing legislation.

In this case the most important single provision of the Federal Power Act with respect to these matters is in serious dispute. Until this court speaks authoritatively on the question, the present hamstringing uncertainty will continue to exist. The case presents itself in a fashion proper for authoritative interpretation and we feel that the situation clearly justifies such

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[1] *Southern Calif. Edison Co.*, 8 F.P.C., 364, 82 P.U.R. N.S. 299 (1949); *California-Oregon Power Company Project No. 2082*, 3 P.U.R. 3d 207 (1953); *Portland General Electric Co.*, 10 F.P.C. 445, 92 P.U.R. N.S. 247 (1951).

action. *U. S.* v. *Brennan,* 134 F. Supp. 42 (1955); *State of Georgia* v. *Pennsylvania Ry. Co.,* supra; *State of Georgia* v. *Tennessee Copper Co.,* supra; *Missouri* v. *Illinois,* supra; *New York* v. *New Jersey,* supra; *Kansas* v. *Colorado,* supra; *Colorado* v. *Kansas,* supra.

SUMMARY OF ARGUMENT

1. By reason of the primacy of federal regulation the State of Oregon in the execution of its laws is influenced and concerned on a continuing basis by the action of federal regulatory agencies, particularly the Federal Power Commission. The state has a legitimate and pressing need to have disputed questions involving the scope and nature of the powers of the Federal Power Commission resolved so that the state may with reasonable certainty proceed in its own legislative and administrative activities.

2. The case involves questions of far-reaching public significance arising under the Federal Power Act (41 Stat. 1077 as amended; 16 U.S.C.A., Section 791 *et seq.*). The administration of this act is of peculiar and sensitive importance to the State of Oregon and to its inhabitants by reason of the importance of the Columbia River and its tributaries to the economy of the Pacific Northwest and of the State of Oregon.

3. The case involves interpretation and application of portions of the Federal Power Act upon which this court has not heretofore authoritatively spoken and related questions as to which this court has heretofore reserved judgment.

ARGUMENT

Public Significance of the Problem

The Constitution reserves to the Federal Government paramount responsibility for comprehensive development of the Columbia Basin. Without authorization from the Congress, Oregon (and the other states of the region) cannot successfully assert effective control over reclamation, navigation and hydroelectric development on the Columbia and its tributaries. *First Iowa Hydroelectric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 66 S. Ct. 906 (1946); *Federal Power Commission* v. *State of Oregon,* 349 U.S. 435, 75 S. Ct. 832 (1955).

The Congress by the Federal Power Act[2] has delegated to the Federal Power Commission its authority to license non-federal projects. But in so doing it has by § 10(a) strictly confined the powers of the Commission so as to protect the interests of the states and their people in sound, comprehensive, long-range development of their critical natural resources. This mandate for full utilization of those resources is at once an expression by Congress of its understanding of the dependence of our people on such optimum development and a clearcut recognition of the responsibility which is the concomitant of its constitutionally delegated powers. To construe § 10(a) as anything but an expression of congressional sensitivity to the profound economic consequences to the regions involved of comprehensive river development is to ignore the entire legislative history and background of the Federal Power Act.

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[2] 16 U.S.C. § 803(a) *et seq.*

This case has aspects which cut far deeper than does a case involving review of an ordinary administrative order. The licensing power exercised by the Federal Power Commission under Part I of the Act is wholly dissimilar in nature to its rate regulating powers under Part II of the Act and to the powers of the Interstate Commerce Commission and other federal agencies to issue certificates of necessity and to regulate rates. An application for a motor carrier certificate of public convenience and necessity before the Interstate Commerce Commission, denied today, may tomorrow be granted upon a showing of changed circumstances. New carriers may be authorized to enter service upon development of additional traffic. This may be accomplished in a matter of weeks, or at most, months. An order of the Interstate Commerce Commission or of the Federal Power Commission fixing utility or carrier rates and charges may be modified from time to time to accommodate changing circumstances or to adjust for errors in the original order.

It is not so with a Federal Power Commission license granted for utilization of a river damsite. Once the license has been exercised, circumstances will not permit the correction of error or accommodation for changes, except in the most limited fashion. The licensee, the people of the region, utility consumers and the economy of the States involved must adjust to the project, whether it turns out to be suited to comprehensive regional development or not.

With only partial development of the potential of major storage sites, the maximum utilization of existing project facilities, the engineering features of many of which have been designed to coordinate with

full stream regulation potentialities of subsequently developed sites, may never be realized. Modification and down-grading of other potential sites may be necessitated, threatening additional under-utilization of overall basin potential. Any compromise with full-scale development at a primary project site will have compounding flood-control, navigation and hydro-electric generation impact upon the remainder of the system, existing and potential. The opportunity to make certain that the Federal Power Commission has given proper attention to such matters in a particular case exists only once. This is such an occasion.

If, as has been most strenuously urged, the order of the Federal Power Commission in this case is violative of the basic principle of comprehensive development so explicitly enunciated by the Congress in Section 10(a) of the act, it cannot hereafter be corrected without enormous financial sacrifice and economic waste,—perhaps not at all. Section 10(a) forms the very heart of the Act insofar as the proper stewardship of the economic interests of the people of the State of Oregon are concerned. Clearly the public importance of seriously disputed questions arising thereunder is such as to justify the court in granting certiorari so that an authoritative interpretation may be made. *Federal Communications Commission* v. *R.C.A. Communications,* 346 U.S. 86, 73 S. Ct. 998 (1953); *Reed* v. *Pa. Ry. Co.,* 351 U.S. 502, 76 S. Ct. 958 (1956); *DeSylva* v. *Ballantine,* 351 U.S. 570, 76 S. Ct. 974 (1956).

The Question Has Not Heretofore Been Authoritatively Determined

The present case rests squarely upon an interpretation of Section 10(a) of the Federal Power Act. This provision has never heretofore been authoritatively interpreted by this court.

First Iowa Hydroelectric Coop. v. *Federal Power Commission,* 328 U.S. 152, 66 S. Ct. 906 (1946), is not in point.

Federal Power Commission v. *Idaho Power Company,* 344 U.S. 17, 73 S. Ct. 85, concerns itself with the inter-relationship of Parts I and II of the Act and is not in point.

Federal Power Commission v. *State of Oregon,* 349 U.S. 435, 75 S. Ct. 832 (1955), is not in point.

Federal Power Commission v. *Sierra-Pacific Power Co.,* 350 U.S. 348, 76 S. Ct. 368 (1956), is not in point.

U. S. ex rel. Chapman v. *Federal Power Commission, et al,* 345 U.S. 153, 73 S. Ct. 609 (1953), is not in point. The case involved a situation in which no dispute existed as to the adaptability of the proposed project to comprehensive regional development under Section 10(a). The court did, however, note the importance of 10(a) when indicating that the case then at hand did not necessitate consideration of the 10(a) provision.

CONCLUSION

We have shown that the State of Oregon and its inhabitants have a significant present and long-range interest in a correct resolution of the presented problems, that certainty in such matters is of great public

concern, that this court has heretofore noted the importance of the questions and has not authoritatively spoken thereon. For these reasons and the reasons set out in greater detail above, we most respectfully urge the court to issue the prayed for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Very respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon
Salem, Oregon

Dated February 14, 1957.

Office - Supreme Court, U.
FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION

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FEDERAL POWER COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION

I. INTRODUCTION

The Attorney General for the State of Washington, upon request of the Honorable Albert D. Rosellini, Governor of the State of Washington, does hereby appear in these proceedings to file a brief as *amicus curiae* on behalf of the State of Washington in support of the petition of the National Hells Canyon Association, Inc., and others, for a writ of certiorari.

The previous administration of the State of Washington intervened and participated in the hearings below before the Federal Power Commission in support of the license applications of Idaho Power Company and in opposition to the high Federal Hells Canyon dam.

Accordingly, the position of said previous administration and the testimony presented in the Commission proceeding on behalf of the Honorable Arthur B. Langlie, former Governor of the State of Washington, are hereby repudiated as being contrary to the best interests of the State of Washington.

II. INTEREST OF THE STATE OF WASHINGTON

The immediate and long-range interests of the State of Washington involved in the decision of the Federal Power Commission and affirmed by the United States Court of Appeals are as follows:

a. Flood control planning is a vital component of any "comprehensive plan" for the development of natural resources in the northwestern United States. It is urged to this Court that the Federal Power Commission erred in giving insufficient weight to the factor of flood control planning in granting a license to the Idaho Power Company in the case at bar and that this error was repeated and affirmed by the Court below.

b. The economic future of the State of Washington, as well as that of other states in the Pacific Northwest, is dependent upon the fullest possible development of the great hydroelectric potential of the Columbia River system. A recent report of the United States Department of Labor points out that "the creation of new job opportunities in the region has lagged in the last five years", and warns that "unless there is an

accelerated development of the resources of the Pacific Northwest, the region's labor force and population will continue to grow at sub-normal rates". The Columbia River is the greatest of those resources. Because of the great impact this case will have, for better or for worse, on the development of that resource, the interest of the State of Washington in its outcome is immense.

III. ARGUMENT

A. This is a Case of First Impression

This case is a case of first impression for this Court; an authoritative adjudication by the Court is necessary to resolve the questions here at issue and to eliminate uncertainty as to the future administration of the Federal Power Act.

In a previous case before this Court the principal issue was whether or not "approval" of a comprehensive plan by Congress had the effect of removing the site in question from the licensing jurisdiction of the Federal Power Commission. *Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953). That issue is not involved here. Conversely, in the former case there was no question of compliance with the Corps of Engineers' comprehensive plan for the river basin involved, which is the primary question in the present case.

B. The Federal Power Commission Erred in Failing to Follow the Comprehensive Plan Intended by Congress for the Development of the Resources of the Columbia River Basin

The basic factor which spells the difference between full development of the Columbia River and serious underdevelopment is adequate upstream storage. Far more than most rivers, the Columbia needs storage

reservoirs to even out its violently fluctuating flows, which historically have an annual maximum to minimum flow ratio of about ten to one.

With adequate storage as provided by the comprehensive plan of the Army Engineers the rampaging flood waters of the spring melting season can be tamed and converted into year-around flows to keep spinning the turbines of hydroelectric generators which would otherwise be idle nine months of the year. Without adequate storage the power potential of the river will be cut in half, and the unstored water will not only be lost; it will also continue to subject thousands of families in the lower Columbia Basin to the annual threat of spring floods.

It is difficult to imagine a more apt example of the principle so clearly stated by President Theodore Roosevelt in 1908 in his message transmitting to Congress the preliminary report of his Inland Waterways Commission, when he said:

> Every stream should be used to its utmost. No stream can be so used unless such use is planned in advance. When such plans are made, we shall find that, instead of interfering, one use can often be made to assist another. Each river system, from its headwaters in the forest to its mouth on the coast, is a single unit and should be treated as such. (S. Doc. 325, 60th Cong., 1st Sess., p. iv).

Such a plan does exist for the Columbia River; it has been largely ignored by the Federal Power Commission in licensing the three projects of the Idaho Power Company.

The Congress in 1927 authorized the preparation of the original comprehensive plan of the Army Corps of Engineers for the Columbia River and its tributaries.

44 Stat. 1010. The present plan of House Document 531, 81st Congress, 2nd Session, is an authorized revision and expansion of that plan. The Federal Power Commission has here licensed for construction projects which eliminate three-quarters of the flood control and storage features of the Hells Canyon project in the comprehensive plan, while at the same time providing barely half as much power production.

The question thus presented is whether, under the "best adapted" requirement of § 10(a), the Commission may substitute, for vital components of the official and only existing comprehensive plan for the Columbia River Basin, projects which are inconsistent with and of lesser benefit than the projects provided by that plan.

Amicus curiae submits that the action of the Commission in the present case constitutes such a substitution and that the substitution is a violation of § 10 (a) of the Federal Power Act.

C. The Commission Erred in Failing to Recommend Federal Development Under § 7 (b) of the Federal Power Act

The problem of adequate flood control storage capacity in the Pacific Northwest is annually becoming more difficult because of the economic growth within the potential reservoir areas. At the same time the necessity for flood control becomes increasingly important. In 1948 a major Columbia River flood resulted in property damage in excess of $100,000,000 and the loss of 38 lives. It is estimated that such a flood today would cost in excess of $200,000,000 in property damage in view of the economic development of the affected areas.

Private licensees will not build large and costly upstream storage reservoirs, because the feasibility of such projects depends to a great extent on the benefits they produce at downstream dams, and in these the private upstream developer has no interest. Nor has it any economic interest in adequate flood control storage, which is quite properly a public problem.

A river once inadequately developed represents the permanent destruction of part of a perpetually renewable energy resource. As distinguished from other administrative decisions, the Commission's licensing decisions on river developments have irrevocable impact.

If the Commission is not required to interpret §§ 10 (a) and 7 (b) of the Act so as to obtain at the few remaining reservoir sites in the Columbia Basin the maximum feasible storage planned for those sites in the comprehensive plan, all hope of achieving adequate storage capacity will be forever lost, and the Columbia River will continue to flow unchecked to the sea in destructive and wasteful floods.

The only way to prevent such waste is for the Commission, under a correct interpretation of the Act, to require as a condition of licensing, development of these storage sites to the full dimensions of the comprehensive plan—the "best adapted" requirements of § 10 (a)—or alternatively to propose federal development under § 7 (b).

The State of Washington therefore maintains that the failure of the Commission to recommend federal development of the Hells Canyon site to the Congress constitutes, in the circumstances of the present case, a violation of § 7(b) of the Federal Power Act.

CONCLUSION

For the reasons stated above and in order to establish an authoritative interpretation of the Federal statutory law governing the Hells Canyon region, the State of Washington respectfully requests this Court to grant a writ of certiorari in accordance with the petition.

Respectfully submitted,

JOHN J. O'CONNELL
Attorney General
State of Washington

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Assistant Attorney General
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Temple of Justice
Olympia, Washington
Dated February 14, 1957

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NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION and IDAHO POWER COMPANY,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATE OF IDAHO, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to paragraph 4, Rule 42, of the Rules of this Honorable Court, the State of Idaho appears in these proceedings to oppose issuance of a writ of cer-

tiorari, and files this brief as *amicus curiae* in support of its position.

This brief is sponsored and filed by the Attorney General of Idaho, and the Honorable Robert E. Smylie, Governor of said State.

QUESTIONS PRESENTED

The fundamental questions before this Court are whether, under the Federal Power Act, the Federal Power Commission, *or some other agency of the United States,* is to exercise the "judgment" necessary to determine (1) whether a given project is "best adapted to a comprehensive plan" of river development, and (2) whether "the development of any water resources" should be undertaken by the United States itself, in which case the Commission must submit its findings and recommendations to Congress.

Petitioners pose these questions under Sections 10(a) and 7(b) of the Act, 16 U.S.C., Sections 803(a) and 800(b). There is here no subsidiary question of "substantial evidence" to support the Commission's judgment, and it is therefore submitted that these two sections themselves answer the questions asked in unequivocal terms; that no writ of certiorari should be issued, or need be issued, to review and redetermine that which is already clear.

The Federal Power Commission is an arm or agency *of the Congress itself,* created *by Congress* to administer the Congressional Act. To the Commission,—not to the Bureau of Reclamation or the Corps of

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Abbreviations used: P., petition; P.A., appendix to petition; J.A., joint appendix; Tr., transcript; Ex., exhibit; R., record in this Court.

Engineers,—Congress has delegated the specific authority to make the decisions and arrive at the judgments necessary to administer the Nation's basic law on the development of water power resources.

The contention that the mere fact that some other agency has made a study and developed a plan (which has been officially before Congress for seven years, without acceptance, approval, adoption or authorization whatsoever), and that such a plan has deprived the Commission of its statutory jurisdiction and "judgment" with respect to license applications, is so patently untenable that no basis for further judicial review has been shown and certiorari should be denied.

THE INTEREST OF THE STATE OF IDAHO IN THESE PROCEEDINGS

Without the Snake River, southern Idaho would still be a desert. The State's present and future economy, welfare and growth depend upon the use of its waters.

Any project for the development of the Snake River, or any reach or tributary thereof, that does not fully serve and protect *upstream* as well as downstream needs and rights (both present and future) for flood control, power and irrigation, is not "best adapted to a comprehensive plan for improving and developing the waterway."

The three-dam project licensed by the Federal Power Commission qualifies as such a project; the oft-proposed but never authorized high dam at Hells Canyon does not. The Commission's judgment and decision were fully correct. No question of "substantial evidence" to support the Commission's finding is

involved. No unsettled "important question of federal law" (Rule 19 of this Court) is involved. Certiorari should be denied.

INTRODUCTORY STATEMENT

The Snake River is an interstate stream. It rises principally in eastern Idaho and in Wyoming in the vicinity of Yellowstone Park. Turning to the west, it flows some 700 miles in a broad curve across southern Idaho, fed by many Idaho tributaries in its course. It then becomes the boundary between the States of Idaho and Oregon, and for a short distance between the States of Idaho and Washington.

Most of the Snake's principal tributaries,—including Henry's Fork, the Blackfoot, the Portneuf, the Big and Little Wood, the Boise, the Payette, the Weiser, the Salmon and the Clearwater (and, in turn, their tributaries),—rise in and flow through Idaho *in their entire courses* to join the Snake.

Its two largest tributaries,—the Salmon and Clearwater,—enter the Snake *below or downstream from the Hells Canyon reach of the river.* Although, as the Federal Power Commission said (P.A., p. 28), the Clearwater and the Salmon "are the two principal flood producing streams in the Snake River Basin and the former is one of the worst flood producers in the entire Columbia River Basin, the flow of these two rivers is unregulated [i.e., they have no storage reservoirs] at the present time." Because the Salmon and Clearwater Rivers enter the Snake *below* Hells Canyon none of their waters is available for storage there; neither would any government dam at Hells Canyon help to control these streams, or serve to hold back their waters for downstream power benefits or flood control needs.

With its existing reservoirs, the Snake River *upstream* from Hells Canyon is already the best controlled tributary of the entire Columbia System. Its reservoirs, now constructed and in operation, have a total usable storage capacity of about 8,500,000 acre-feet, equal to about two-thirds of the total average *annual* flow of the river. (P.A., 29). As testified at the F.P.C. hearing by Idaho's State Reclamation Engineer and also by a former Deputy State Engineer,[1] undeveloped upstream reservoir sites can ultimately provide an additional 7,240,000 acre-feet of storage which is needed for local flood control as well as for future irrigation development, *and will also provide both downstream power and flood control benefits equally as well as a reservoir or reservoirs far downstream in the Hells Canyon reach of the river.*

With existing reservoir storage, these additional upstream reservoirs will provide more water storage capacity than there is water flowing in the river in better-than-average years. The licensed Brownlee dam of Idaho Power Company (one of the three here involved) alone will add 1,000,000 acre-feet of new storage capacity. The high Hells Canyon dam would add 3,880,000 acre-feet of capacity, which, together with existing storage (8,500,000 a.f.), would about equal the entire *total annual flow* of the river in an average year![2]

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[1] R., volume I, Tr. 2590, 4313-14; R., volume V, Exs. 54-A, 54-B, Tr. 19727-28.

[2] Approximately only 12,500,000 acre-feet (Tr. 2580-81, 21113). It should be noted that water cannot be stored throughout the entire year; the refill storage period is limited to 3-4 months, either at Brownlee or Hells Canyon; the balance of the year the reservoir is being drawn down.

The impact of the high dam upon the State's future development is readily apparent. How can future upstream reservoirs be built,—why should they be built,—if there is not enough water in the river (in average years, let alone dry years when storage is most needed) to store in them? Even today, in years of low stream flows (and when water is short for irrigation, it is also short for power generation), the big power reservoir, located far downstream from where irrigation diversions and storage are required, would be in conflict with upstream irrigation use.

Further, there are in southern Idaho more than two million acres of good, new land, needing only water to bring it under cultivation as population growth in the Nation presses upon existing food supply. This is not marginal land. It is of the same high quality as the 2 3/4 million acres now under cultivation through reclamation development. Each new acre reclaimed from the desert will require, each year, a consumptive use of from 1.75 to 2 acre-feet of water for crop growth, evaporation and other net irrigation losses. Irrigation development is steadily expanding, and the evidence before the Commission indicated that up to a million new acres may economically be brought under cultivation by the turn of the century. This will further diminish the flow of the river available for storage in the Hells Canyon area by another 1 1/2 to 2 million acre-feet each year.

THE THREE-DAM PROJECT IS BEST ADAPTED TO A COMPREHENSIVE PLAN UNDER SECTION 10(a) OF THE FEDERAL POWER ACT

Any attempt to determine, under Section 10(a) of the Federal Power Act, whether a project is "best adapted to a comprehensive plan" of river development, must necessarily and rationally consider the size

of the reservoir (or alternative reservoirs) involved. It is a matter of economic and engineering judgment, the inherent type of "judgment" delegated by Congress to the Commission under the Act.

The evidence before the Commission makes it clear in the record why the licensee determined upon 1,000,000 acre-feet of useable storage as best adapted for this reach of the river (R., Tr. 3473-82; Tr. 5544-45, 5622-39, 5643-47; Exs. 88A and 88B, J. Ap. 19805-19806). Based upon a typical 20-year period of officially recorded streamflows (1929-1948), adjusted for subsequent irrigation to date, it was estimated that with the level of irrigation development expected by 1962 (which is fairly predictable) there are only *4 years out of 20* when 3,800,000 acre-feet would be available to fill the larger reservoir; and that there would be *7 years out of 20* when there would be less than 2,000,000 acre-feet (only about half the capacity of the high dam) available in the river for re-fill storage (Ex. 88B, J.Ap., 19806; Tr. 3473, 3488). As additional irrigated acreage is brought under development, the situation, of course, will grow worse. On the other hand, the 1,000,000 acre-feet of storage, in the project licensed by the Commission, can be filled and used every year.

In fact, several engineering witnesses (including the Idaho State Reclamation Engineer and others besides those of the Applicant) demonstrated that more than 1,000,000 acre-feet of storage in this reach of the river,—even after considering additional benefits,—would result in power costs in excess of the cost from other alternative sources of supply, even including high-cost steam (R., Tr. 3001-14, 4396-97, 9442-45, 9463, 20883, 20825). This, of course, is another way

of testing the relative desirability of different size reservoirs.

These matters also reflect themselves in the power production capacity of the larger dam. Although the Commission was of the opinion (P.A., 34) that future irrigation depletions would not be significant "insofar as the power potentials" of the Hells Canyon reach of the river are concerned, the fact was made clear that, in a repetition of a low water year, such as the 1936-1937 period, generation from the high dam would have to be dropped to an average of only 66,000 kilowatts for *three entire months* of the year, and to about 490,000 kilowatts for *four additional months* (instead of the full plant capability of 800,000 kilowatts). This appears from the statement of the Power Manager of the Bonneville Power Administration, before the House Committee on Interior and Insular Affairs, Subcommittee on Irrigation and Reclamation, hearings on H.R. 5743, officially published as Serial No. 20, page 360, 82nd Congress, 2nd Session. The power loss in the high dam is due to the fact that the power plant would have to be shut down, in order to conserve water. On the other hand, the three-dam project licensed by the Federal Power Commission would not be affected at all, and could operate and maintain its full load-carrying capacity.

It is not our intention to review the evidence before the Commission. The above points are mentioned *only to illustrate* a few of the complex and conflicting objectives the Commission had to consider, and the varying assumptions that were made in the numerous studies presented in the 20,000-page hearing record with some 450 exhibits (*cf.*, P.A., 32), all of which the Commission had to rationalize and evaluate in

forming its ultimate "judgment" that the licensed project was "best adapted to a comprehensive plan" of developing the waterway. Federal Power Act, Sec. 10(a); 16 U.S.C., Sec. 803(a). They illustrate the wisdom of the rule referred to by the Court of Appeals (4th Circuit) in *U. S.* v. *Federal Power Commission*, 191 F. 2d 796, at 808 (affirmed by this Court, 345 U.S. 153, at 171):

> "The rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission * * * "

Upstream Development Is True Multi-Purpose Development

The economic life of southern Idaho depends wholly upon the Snake River and the utilization (including storage) of its waters as they flow through the State. Upstream reservoirs are essential. They store waters in the areas where the snow-melt occurs. This storage serves local flood control needs (where flood damage occurs almost every year), *and at the same time is as fully effective for control of floods on the lower Columbia as if the water were stored farther downstream* (as at Hells Canyon, after upstream flood damage has been done).

Upstream storage will also provide needed supplemental water for lands already under cultivation but with an inadequate water supply. It will supply irrigation water for new lands as future conditions require their reclamation.

And upstream reservoirs will also serve to create downstream power benefits at both Government plants and private plants located all along the Snake and on its tributaries across the State, as well as at Government plants on the lower Snake and Columbia.

There is no magic in storing all the water in the river at Hells Canyon. As pointed out above, a reservoir of excessive size would require all the remaining upstream water in order to be filled in low water years (when upstream irrigators are already short). Conflicts would inevitably arise between upstream irrigation and downstream power storage needs. The development of further upstream storage would be hindered, if not permanently blocked.

The three-dam project, as licensed by the Federal Power Commission, is a proper solution of these matters. Its million acre-feet of storage can be filled and used every year. It will not preempt water that is needed upstream for local storage there. It will be built with private funds, require no Congressional appropriations, save 400 to 500 million dollars of Federal expenditure, and thus leave the Federal Treasury in better position to provide developments that are more needed, and will be more effective, elsewhere.

It is submitted that these matters are all essential parts of determining what is "best adapted to a comprehensive plan"; that the Commission's license order is fully in accord with the clear intent and purpose

of the Act; and that no basis for granting certiorari, either under this Court's Rule 19 or otherwise, has been shown.

NO BASIS FOR CERTIORARI EXISTS TO REVIEW THE COMMISSION'S JUDGMENT UNDER SECTION 7(b)

Petitioners' contention as to the Commission's "judgment" under Section 7(b) of the Act (P.A., 37-38, 53, finding (45)), is governed by the same principles. It is the judgment of the Commission,—not of some departmental agency,—that governs whether the Commission shall submit its findings and recommendations to Congress if and because, in *its* judgment, the development of any water resources should be undertaken by the United States itself. Here, the Commission determined otherwise, for reasons clearly stated and fully supported.

If departmental studies and programs could thus withdraw from the Commission its jurisdiction and judgment conferred by statutory law, the Federal Power Act would have neither meaning nor further effect. The Act applies to *all* water power resources, *not only to those for which some other agency has not yet filed a plan.* Unless Congress itself has acted with respect to a given project or resource, the Commission's jurisdiction, as well as its "*principal responsibility*" under Section 7(b) stands unimpaired. *U. S.* v. *Federal Power Commission,* 345 U.S. 153, at 168, 173 (1953).

"The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *U. S.,* 307 U.S. 125, at 146. The law is clear; no writ of certiorari is required to settle it. The petition should be denied.

PETITIONERS HAVE SHOWN NO BASIS FOR FURTHER REVIEW. THE POWER SITUATION IS CRITICAL. CERTIORARI SHOULD BE DENIED

The question of power supply in southern Idaho was also properly considered by the Commission. Idaho Power Company, F.P.C. licensee and respondent in this proceeding, is the principal supplier of power in southern Idaho. It serves some 126,000 consumers in an area representing approximately 60% of the population of the entire state.

The territory is growing and power needs are expanding rapidly. For years the Company's system has shown the fastest rate of growth of all major electric systems in the Pacific Northwest—14% to 22% per year over the past ten years (J.Ap., vol. V, Exs. 19 and 23, Tr. 19460, 19466; vol. I, Tr. 1444-54). Its peak load has grown to exceed considerably its present generating capacity, and it is purchasing steam power from a neighboring utility under a temporary and declining supply contract (J.Ap., vol. VI, Ex. 24, Tr. 19466; Ex. 97, Tr. 19815). When the F.P.C. hearing closed in July, 1954, the licensee's generating capacity was (and still is) 354,700 kilowatts; its peak load had exceeded 381,000 kw (J.Ap., vol. V, Ex. 25, Tr. 19468). The situation is much worse today, two and a half years later. By 1962, the Company must have at least 610,000 additional kilowatts of generating capacity to meet its expected peak load demands (J.Ap., vol. VI, Ex. 83, Tr. 19793). Allowing for a reasonable reserve for generator outages and emergencies, *this amounts to the entire installed capacity licensed in Brownlee and Oxbow together.* The Commission recognized this need and said (P.A. 39) that the record showed "that the output of the Brownlee development would be needed by the time it could be

completed, and that an additional supply from Oxbow would be needed by 1962.'"[3] Under either basis, construction of the third (Hells Canyon) unit of the project will have to be started one and a half to two years prior to the time when its first power will be needed. Large power plants (especially in this isolated mountainous area) are not built in a day.

A stay of the Commission's license order has been denied in this Court, and the record shows that the construction of Brownlee is well under way (it will be completed, with 360,400 kilowatts, in 1958), and preconstruction work at Oxbow has also been done.

(Any temporary surplus power from the three dams will be absorbed by the Northwest Power Pool, of which the licensee Company is a part (*cf.*, P.A., 53, finding 42). The power supply in the Northwest is extremely critical, and power from every possible source is immediately and urgently needed.)

As a public utility, the licensee here has a public utility responsibility—a duty imposed by law,—of anticipating and supplying all power needs in this area,—in this case most of southern Idaho. Throughout this entire proceedings since 1950, no one else,—and certainly not the Petitioners,—has advanced any concrete, responsible proposal for supplying power to the licensee's service area. The Company pointed this out in its brief before the Court of Appeals, and it is particularly apt here. The most that Petitioners can offer is that "bills have again been introduced." Their responsibility in southern Idaho is, of course, *nil*.

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[3] This was based upon the lower estimates prepared by the Commission Staff. It is the Company, however, that has the legal responsibility of supplying southern Idaho with power.

At the request of the Federal Power Commission, the State of Idaho, through its Public Utilities Commission, submitted its views (J.Ap., vol. VI, Ex. 128, Tr. 19956-19961) on June 29, 1953. This communication is included herein as Appendix A.* It was a sound position then; and with the advantage of three and a half years of hindsight experience, it is a sound position today. In issuing a license for the project, the Federal Power Commission concurred with the State's views, as then presented, and to which the State of Idaho still adheres.

The power demands facing southern Idaho and the licensee Company's system are not only realities; *they are immediate necessities.* High Hells Canyon,—even if authorized, appropriated for, and constructed,—would require a minimum of at least five or six years after commencement of construction (assuming that adequate appropriations were annually forthcoming) before even its first generator could be in operation. Brownlee alone will provide 1,000,000 acre-feet of flood-control and power storage, and 360,400 kilowatts of power *in time to meet next year's winter peak demand.* (Except for the delays encountered through these long drawn-out proceedings, Brownlee could be in operation now; had it been, the current dropping of interruptible loads by the Bonneville Power System, with which the licenseee Company's lines are connected, could have been largely avoided.

As the Court of Appeals said (P.A. 17), "The Commission did not act hastily in this matter." Two and one-half years elapsed after the Company filed its first license application in 1950, before the Commission

* The Governor and State Reclamation Engineer of Idaho filed a similar statement on June 5, 1953 (Ex. 15, J.A., vol. V, 19455-56).

began its hearing in Washington in July 1953. The hearing continued for a full year. The Commission's license order was not forthcoming for another year, until August 1955. The Court of Appeals affirmed October 9, 1956. Petition for rehearing was considered and denied by the Court *en banc* on November 16, 1956.

During all this time (in and since 1950), bills to authorize the alternative Federal dam have been before each session of each Congress. During all this time Congress has not acted, except to reject the Federal Hells Canyon dam three times, the last by decisive Senate vote on July 19, 1956.

The case in the Court of Appeals was submitted May 15, 1956. It was decided October 9, 1956. Whether by intent (to give Congress another opportunity to act) or otherwise, the decision below followed the action and adjourment of Congress.

But, Petitioners say, new bills have again been introduced; and contend, at this late day, that this is a reason for granting their writ.

The political ramifications in the Hells Canyon controversy are clear. Already too-long extended, it has been a deterrent to other needed and non-controversial developments throughout the Northwest. In fact, *this is one of the basic reasons why the Federal Power Act was passed, namely, to keep the development of our natural resources out of politics,* and place it under the supervision and judgment of a permanent agency of the Congress, having a competent, expert and unbiased staff, and subject to all the public safeguards which the Act itself contains.

The Commission summed up its decision (P.A., 37):

> "Development by Applicant of the Hells Canyon reach of the Snake River would provide

> 1,000,000 acre-feet of flood-control storage and the required stream flow regulation in aid of navigation on the lower river at no cost to the United States, would permit a reasonably prompt development of a water-power resource now going to waste, would assist in providing sooner a source of power supply for development of phosphate resources for use in fertilizer production, and
>
> would make possible the serving of electric consumers in the service area of Applicant with the lowest cost power supply that it could develop."

The usual 3-judge panel of the Court below affirmed, and the Court *en banc* considered and denied petition for rehearing.

CONCLUSION

The State of Idaho submits that no sound basis for certiorari has been shown; that the Commission's decision was in full accordance with the intent and purposes of the Federal Power Act; and that the Court below correctly affirmed. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body". *Rochester Telephone Corp.* v. *United States, supra.*

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GRAYDON W. SMITH
Attorney General of Idaho

ROBERT E. SMYLIE
Governor of Idaho

State House
Boise, Idaho

March 11, 1957

APPENDIX A

George R. Jones, President
H. C. Allen
H. N. Beamer
Commissioners

(19956)
(Exh. 128)

Stephen L. Guice,
Secretary

R. E. Larsen,
Utilities Auditor

R. W. Shirley,
Chief of Transportation

Idaho Public Utilities Commission
Boise

Address All Communications to the Commission

In Reply Please Refer To File No. .....

June 29, 1953

Federal Power Commission
Washington 25, D. C.

Gentlemen:

RE: PROJECTS 1971, 2132 and 2133

Reference is made to the Commission's letter of May 25, 1953, together with Notice dated May 25, 1953, of applications for licenses for Projects 2132 and 2133; also copy of Order of May 27, 1953 fixing hearing on applications for licenses for Projects 1971, 2132 and 2133, and consolidating all three proceedings for hearing set for July 7, 1953. In response to the above Notice, we desire to advise the Federal Power Commission as follows:

I.

The Idaho Public Utilities Commission is the official agency and regulatory authority of the State of Idaho, charged with the legal duty to administer the Idaho Public Utilities Law (Idaho Code, Title 61) and, among other

things, to insure that the public is provided with adequate electric service, without preference or discrimination, and at just and reasonable rates.

II.

The Idaho Power Company, applicant for licenses for Projects 1971 (Oxbow), 2132 (Hells Canyon) and 2133 (Brownlee), is an electric public utility, subject to the Public Utilities Law of the State of Idaho, and the regulatory authority and control of this Commission. Said Company is by statute of the State of Idaho (Idaho Code, Sec. 61-302) required to furnish, provide and maintain such service and facilities as shall be in all respects adequate and efficient. Said Company provides electric service to approximately 118,000 customers in southern Idaho, eastern Oregon and northern Nevada, and through the provision of electric power generating stations has provided service and facilities which have been adequate and efficient in supplying all electric power demands of its customers and the service requirements of the area which it supplies. In spite of the fact that such requirements have grown, and are continuing to grow, with great rapidity, this Commission points out to the Federal Power Commission that the southern Idaho area, and those portions of eastern Oregon which receive their electric service from the power generated and provided by this applicant, are the only areas in the Pacific Northwest in which there is not and never has been a shortage or deficiency of electric power supply.

III.

Applicant's maximum hour system load increased from 111,200 kilowatts (KW) in 1945, to 242,100 KW in 1950, an increase of 118%. By 1955, applicant's peak load is estimated to increase to approximately 440,000 KW; and by 1960, to 740,000 KW.

IV.

As stated in the applications for licenses for Projects 2132 and 2133, the installed capability capacity of applicant's power plants on its system (excluding the minor standby installation in the Salmon area) is 354,700 KW. It is obvious and imperative that a major installation of additional generating capacity by said applicant should be commenced immediately; otherwise, by 1955 (the earliest date by which the Oxbow or any other development could be placed in service) applicant's system load will exceed its system generating capability by more than 88,000 KW; and by 1960, by approximately 390,000 KW. It is assumed that loads in the Northwest area (where deficiencies already exist) will have a corresponding growth.

V.

This Commission endeavors to keep in touch with the prospective load requirements and the power supply programs of the applicant, as well as other utilities under its jurisdiction, in order to insure, if possible, that the people of the State of Idaho, and the future growth of the area, will not suffer from a shortage of needed power supply such as exists elsewhere in the Northwest. The Commission is familiar with various investigations which have been made by the applicant as to other power sources, including steam generation, and also including preliminary investigations as to other hydro site potentials on Snake River. Aside from the fact that all of said developments would be unduly expensive to construct, none of said sites is large enough to warrant development at this time in view of the rapidly growing power demands of the southern Idaho and eastern Oregon area, and the increasing seriousness of the deficiency in power supply which already exists in the Pacific Northwest.

VI.

With respect to Projects 1971, 2132 and 2133, the applicant's estimates of the cost thereof indicate that the Oxbow

development can be installed at a cost of approximately $156 per KW of capacity; that all three developments (Oxbow, Hells Canyon and Brownlee, including 1,000,000 acre-feet of usable annual storage) can be installed at an over-all average cost of approximately $170 per KW of capacity. This Commission has reviewed and checked said cost estimates, and believes them to be reasonably accurate and sufficient, based on existing construction costs and conditions. This Commission points out that these costs of $156-$170 per KW of installed capacity are phenomenally low costs for hydroelectric generating installations.

VII.

This Commission is generally familiar with various proposals for the construction of multiple-purpose hydroelectric power installations by the Federal Government or agencies thereof; also with the proposal for the construction of a high dam for power purposes at Hells Canyon, which latter would flood out and destroy all three of the sites for Projects 1971, 2132 and 2133. From available reports and investigations, it appears that said projects will provide flood control, navigation and recreational benefits comparable with those claimed for said Hells Canyon high dam proposal; and from published figures concerning said Hells Canyon proposal, it appears that, regardless of controversial statements as to the power capacity and value thereof, the cost thereof is excessive and uneconomic,—approximately $450 per kilowatt of installed capacity, and that the cost per kilowatt of additional power, if any, which would be available from the proposed Hells Canyon high dam power plant, over and above the power available from Projects 1971, 2132 and 2133, would be several times said amount.

Furthermore, this Commission points out to the Federal Power Commission that neither the Northwest area in general, or the southern Idaho area in particular (for whose adequate power supply the Idaho Commission is re-

sponsible as a regulatory body as provided by law), can await the seven to ten years that will obviously be required for the construction of Hells Canyon high dam or any other new development of comparable cost and size, even assuming that adequate appropriations for continuously prosecuting the work could be obtained. On the other hand, Project 1971 (Oxbow) can be completed and in service within 24 months, and Projects 2132 and 2133 in 30 to 36 months, thus providing 783,000 kilowatts of rated capacity and 900,800 kilowatts of peaking capability (plus additional generation from downstream plants as a result of water releases from the Brownlee storage reservoir) for which there is urgent and immediate need.

VIII.

Idaho Public Utilities Commission is by statute a bipartisan, non-political body, and is not interested in or concerned with the ideologies and politics of the Hells Canyon-Oxbow controversy. This Commission, however, is vitally concerned with and to the extent provided by law responsible for the essential and necessary supply of power, by the electric utilities under its jurisdiction and regulation, to the people of the State of Idaho and the installation by said utilities of adequate generating facilities, as required of them by the laws of Idaho, to anticipate and meet the rapidly increasing demands for electric power in their service area, so as to avoid the critical shortages and deficiencies which have been permitted to develop elsewhere in the Northwest. The development of existing phosphate furnace mining and other industrial loads in southern Idaho, including important loads involving the national defense and security, as well as the increase in general load, make the problem of a continued adequate power supply, and the immediate installation of additional generating facilities, one of vital and immediate concern to this area and to the national welfare, and a problem which has now reached emergency proportions.

We submit that it is the responsibility of regulatory commissions to see that no power shortages develop, and to anticipate power demands, and provide for facilities being ready to meet them, in advance of their occurrence. We request that every effort be made to reach a prompt decision as to the method of development of the stretch of the Snake River involved in these proceedings, and that appropriate licenses be issued for the full and speedy development of the power resources of this area, as a requirement of immediate public necessity.

IDAHO PUBLIC UTILITIES COMMISSION
/s/ By GEORGE R. JONES
George R. Jones, *President*

ATTEST:

/s/ STEPHEN L. GUICE
Stephen L. Guice, *Secretary*

cc: Governor Len Jordan